92-1591

Supreme Court, U.S.
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No. 92-1591

In The

Supreme Court of the United States

October Term, 1992

WILLIAM D. JOHNSON,

Petitioner,

v.

POWELL F. CARTER, and
UNITED STATES OF AMERICA,

Respondents.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does any federal court have the authority to review the Attorney General's certification, under 28 U.S.C. Sec. 2679(d) ("the Westfall Act"), that a federal employee was in the scope of employment at the time of committing a tortious wrong?

2. Is a four star admiral in the United States Navy within the scope of his employment when he invokes the authority of his office in defense of his wife?

LIST OF PARTIES

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, *Johnson v. Carter*, 983 F.2d 1316 (4th Cir. 1993), issued January 15, 1993, is reproduced at Appendix, p. A1. The Order of the United States Court of Appeals for the Fourth Circuit, issued October 9, 1991, vacating the Opinion of the panel, issued July 8, 1991, 939 F.2d 180 (4th Cir. 1991), and placing the case on the *en banc* calendar, is reproduced at Appendix, p. A39. The Opinion of the three member Fourth Circuit panel sustaining the district court, decided July 8, 1991, 939 F.2d 180 (4th Cir. 1991), is reproduced at Appendix, p. A40. The opinions of the District Court for the Eastern District of Virginia (Norfolk Division) dated January 31, 1990 (oral order) and April 30, 1990 denying the defendant Carter's motions to substitute the United States as the proper party defendant and dismiss are reproduced at Appendix, pp. A76 and A71, respectively. The Order of January 31, 1990 was an oral order and the transcript of all comments of District Judge, along with an Order correcting the transcript, are reproduced at Appendix, pp. A76 and A84. The Order of the District Court for the Eastern District of Virginia dated May 15, 1990, granting the Motion to Stay pending appeal, is reproduced at Appendix, p. A68.

JURISDICTION

The *en banc* judgment of the Court of Appeals was entered on January 15, 1993. The date of the order granting a rehearing *en banc* was October 9, 1991. This Court

has jurisdiction to review the judgment or decree in question by writ of certiorari under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case are:

1. The Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELRTCA) (hereafter "The Westfall Act"), 28 U.S.C. § 2679. This statute is set forth in Appendix, p. A86;

2. 10 U.S.C. § 933, entitled "Conduct Unbecoming an Officer and a Gentleman," provides as follows:

> Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.

3. 32 C.F.R. § 721.18(b)(4), (c), and (d), denominated "Bedrock Standards of Conduct for Department of the Navy Personnel," provides, *inter alia*, that a Naval officer must

> (b) [a]void any action, whether or not specifically prohibited, which might result in or reasonably be expected to create the appearance of:
>
> * * *
>
> (4) [l]osing complete independence or impartiality,
>
> * * *

> (c) [d]o not engage in any activity . . . which results in a conflict between your private interest and the public interest of the United States related to your duties.
>
> (d) [d]o not engage in any activity that might result in or reasonably be expected to create the appearance of a conflict of interest.

This full text of this regulation is set forth at Appendix, p. A90.

4. 32 C.F.R. § 700.702(b), Chapter VI – Department of the Navy Subchapter A – United States Navy Regulations and Official Records, Part 700 – United States Navy Regulations, Subpart G – The Command Officer, at 700.702 Responsibility, provides as follows:

> (a) The responsibility of the commanding officer for his command is absolute, except when, and to the extent, relieved therefrom by competent authority, or as provided otherwise in these regulations. The authority of the commanding officer is commensurate with his responsibility. While he may, at his discretion, and when not contrary to law or regulations, delegate authority to his subordinates for the execution of details, such delegation of authority shall in no way relieve the commanding officer of his continued responsibility for the safety, well-being, and efficiency of his entire command.
>
> (b) A commanding officer who departs from his orders or instructions, or takes official action which is not in accordance with such orders or instructions, does so upon his responsibility and shall report immediately the circumstances to the officer from whom the prior orders or instructions were received.

> (c) The commanding officer shall be responsible for economy within his command. To this end he shall require from his subordinates a rigid compliance with the regulations governing the receipt, accounting, and expenditure of public money and materials, and the implementation of improved management techniques and procedures.
>
> (d) The commanding officer and his subordinates shall exercise leadership through personal example, moral responsibility, and judicious attention to the welfare of persons under their control or supervision. Such leadership shall be exercised in order to achieve a positive, dominant influence on the performance of persons in the Department of the Navy.

5. 32 C.F.R. § 700.1201, Subpart K – Purpose and Force of Regulations within the Department of the Navy, § 700.1201 Purpose and Force of United States Navy Regulations, provides as follows:

> United States Navy Regulations is the principal regulatory document of the Department of the Navy, endowed with the sanction of law, as to duty, responsibility, authority, distinctions, and relationships of various commands, officials, and individuals. Other regulations, instructions, orders, manuals, or similar publications, shall not be issued within the Department of the Navy which conflict with, alter or amend any provision of Navy Regulations.

6. Navy Regulations, Article 0814, Abuse of Authority, states as follows:

> Persons in authority are forbidden to inure their subordinances by tyrannical or capricious conduct, or by abusive language.

7. Uniform Code of Military Justice, Article 133(a) and (c)(3), set forth in Appendix, p. A92.

STATEMENT OF CASE

In this case, United States Navy four-star Admiral Powell F. Carter, then Commander in Chief of the Atlantic Fleet, invoked the authority of his military rank to publicly defame a civilian naval base policeman, because the policeman had annoyed the Admiral's wife. At issue is whether the Westfall Act insulates the Admiral from personal liability for this defamation.

On Fathers' Day, June 18, 1989, at approximately 2:30 p.m., while operating a stationary traffic radar unit on the Norfolk Naval Air Station, Norfolk, Virginia, patrolman William D. Johnson made a routine stop of a privately owned vehicle clocked at 40 m.p.h. in a 25 m.p.h. zone. The speeding vehicle was being driven by the defendant's daughter, Janeen, who was following her mother, Carole Carter, the defendant's wife.

As Officer Johnson was attempting to issue a warning to Janeen for speeding, Carole Carter circled back behind Officer Johnson's police unit, stopped, and proceeded to exit her vehicle and approach Johnson and Janeen. As is standard procedure when a citizen interferes with the discharge of a policeman's duties, Johnson peremptorily directed Mrs. Carter back to her vehicle. After Officer Johnson released Janeen, he approached

Carole Carter's car, explained what had transpired with her daughter, and then resumed traffic surveillance.

Apparently incensed at having been treated like an ordinary citizen, Carole Carter returned home and registered her displeasure with her husband, whose command jurisdiction included the Norfolk Naval Base. Having earlier concluded a Father's Day visit with Janeen, and now gardening, the Admiral suspended operations in the garden and called the base duty officer and ordered her to produce Johnson to account for himself.

Officer Johnson was forthwith summoned to base police headquarters and then escorted by his supervisor and the base duty officer to the Admiral's government mansion on the base. Once there, the trio was alternately lectured and interrogated about Officer Johnson's demeanor in the presence of Mrs. Carter.

In the course of this encounter, Admiral Carter asked Johnson directly if he had been rude to Mrs. Carter, to which Johnson responded, "No Sir," and to which Admiral Carter countered, "You are a liar." That aspersion was subsequently parleyed in the local press, and in the following October of 1989 Officer Johnson filed the underlying defamation case against Admiral Carter in state court.

Two particulars of the evidence are worthy of elaboration here. One is that substantial evidence indicates Admiral Carter did in fact summon Officer Johnson; the other is that substantial evidence indicates the Admiral summoned Johnson and called him a liar solely because of the perceived affront to his wife, not out of duty to the national defense.

The base duty officer, Lt. Irene Glass, testified by deposition that Officer Johnson was summoned to the Admiral's quarters, because "the Admiral wanted the policeman involved and his boss and myself to go to his quarters together." Appendix, p. A97.

Indeed, in his deposition Admiral Carter admitted calling for Johnson.

> A. * * * The whole purpose of the meeting with Officer Johnson was not to discipline him in any way or reprimand him or anything. The whole reason *I called for him*, as I told the duty officers, was I wanted to identify for sure who was the driver of that patrol car. . . .

Appendix, p. A100, emphasis added.

In his deposition Admiral Carter equivocated about whether he explicitly used the term "liar" or merely said Johnson was "lying," but he frankly admitted that he spoke in anger at Johnson specifically because Johnson had contradicted Mrs. Carter and Janeen.

> A. At that point, I turned to Johnson and said, "Are you the officer that stopped my daughter and used demeaning, aggressive, intimidating manners . . . " * * * And he kind of rolled his eyes up and said, "No, none of those things," which, of course, would mean my family was lying. At that point, once he did that – and then I, you know, told him as I said earlier that I believe my family. I think you're lying."

Appendix, pp. A100, A101, and A102.

In his personal notes introduced as Exhibit 3 to his deposition, Carter added:

> When I accused Johnson of being discourteous he denied it in a manner and expression that I took to mean he was accusing my wife and daughter of lying. I became angry and said I thought he was not telling truth [sic]. I then told [Major Maynard] I thought he should instruct Officer Johnson on how to be professional and courteous while doing his job without frightening women who are no threat to him.

In his deposition, Admiral Carter further stated:

> A. * * * Now, of course, it certainly made me angry a little bit. I was agitated about the fact – the way his whole demeanor was that, you know, obviously, my own family must be not telling the truth. . . .

Appendix, p. A102.

In response to the state defamation claim, Admiral Carter moved to remove the case to federal court pursuant to 28 U.S.C. 1442 and 28 U.S.C. 2679(d)(2) and moved to have the United States substituted as the defendant. The United States Attorney certified, under 28 U.S.C. 2679(d)(2), that Admiral Carter was acting within the scope of his employment when the allegedly defamatory statement was uttered.

After removal, the district court denied the defendant's motion to substitute the United States as the sole defendant. Admiral Carter filed a renewed motion to substitute the United States as the sole defendant, and the district court, treating that pleading as a motion for reconsideration, denied it also.

Admiral Carter appealed to the Fourth Circuit Court of Appeals, and a divided panel upheld the district court's ruling. *Johnson v. Carter*, 939 F.2d 180 (4th Cir. 1991). Subsequently, a rehearing *en banc* was granted; the panel opinion was vacated, *Johnson v. Carter*, 939 F.2d 180 (4th Cir. 1991); and the full Fourth Circuit reversed the district court, with four members dissenting. *Johnson v. Carter*, 983 F.2d 1316 (4th Cir. 1993).

The primary basis for the Fourth Circuit's ruling was its holding that "the district court erred in not giving conclusive effect to the Attorney General's scope certification." *Johnson v. Carter*, 983 F.2d 1316 (4th Cir. 1993). Appendix, p. A9. Secondarily, the Fourth Circuit held that, even if reviewable, the scope certification was appropriate to the facts, i.e. the Admiral was within his scope.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE FOURTH CIRCUIT'S HOLDING THAT THE ATTORNEY GENERAL'S CERTIFICATION OF SCOPE IS NON-REVIEWABLE FOR PURPOSES OF SUBSTITUTION IS IN CONFLICT WITH SEVEN OTHER CIRCUITS AND THE DEPARTMENT OF JUSTICE.

Seven other circuits and the Department of Justice disagree with the Fourth Circuit's holding that the

Attorney General's certification of scope is non-reviewable for purposes of substitution.[1] Supreme Court Rule 10(a).

The Westfall Act was passed in response to *Westfall v. Irwin*, 484 U.S. 292, 108 Supreme Court 580, 98 L.Ed.2d 619 (1988), which had held that federal employees are immune to personal tort liability only when acting within their scope of employment and exercising governmental discretion. The purpose of the Westfall Act was to restore absolute immunity to federal employees for activities within their scope of employment, whether discretionary or not.

The issue here is who finally determines whether the employee was within his scope: the executive branch or the judiciary. The reason most consistently cited by the seven circuits holding that the Attorney General's certification is reviewable by the judiciary is the statutory language itself, which indicates that, while the certification is conclusive for purposes of *removal*, it is not conclusive (and, therefore, is reviewable) for purposes of *substitution*. This and the other reasons relied upon by the circuits holding the certification to be reviewable are discussed below.

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[1] *Brown v. Armstrong*, 949 F.2d 1007, 1010-11 (8th Cir. 1991); *Meridian Int'l Logistics, Inc. v. United States*, 939 F.2d 740, 743-45 (9th Cir. 1991); *Hamrick v. Franklin*, 931 F.2d 1209, 1210-11 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 200 (1991); *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1540-42 (11th Cir. 1990), *modified*, 924 F.2d 1555 (11th Cir.), *cert. denied*, 112 S. Ct. 62 (1991); *Melo v. Hafer*, 912 F.2d 628, 640-42 (3d Cir. 1990), *aff'd on other grounds*, 112 S. Ct. 358 (1991); *Nasuti v. Scannell*, 906 F.2d 802, 812-13 (1st Cir. 1990); *Arbour v. Jenkins*, 903 F.2d 416, 421 (6th Cir. 1990).

Meridian International Logistics Inc. v. U.S., supra note 1, was a defamation action in which it was alleged that an FBI agent uttered defamatory remarks while acting outside the scope of his employment. The District Court held that the publication was within the agent's scope; substituted the United States as the defendant; and then, because no administrative claim had been filed, and because defamation is not actionable under the Federal Tort Claims Act, dismissed the case. The Ninth Circuit reversed, holding "District Courts may review the Attorney General's scope determinations. . . . " *Id.* at 745. This widely accepted common sense interpretation effects the federal policy of removing a claim against a federal employee to a federal forum, without going so far as to give the federal defendant the unilateral right to end the suit against himself, to the extreme prejudice of the opposing litigant.

Elaborating, the Ninth Circuit noted the statutory language that "certification of the Attorney General shall conclusively establish a scope of office or employment for purposes of *removal*," *id.* at 744 (emphasis added); 28 U.S.C. § 2679(d)(2), and emphasized "the Reform Act's comparative silence as to the conclusive effect of certification on *substitution*," *id.*, (emphasis added). The court thus inferred that " 'Congress intended to make scope certification unreviewable only with respect to removal' and not with respect to substitution." *Id.* at 744.

Beyond statutory construction, the Ninth Circuit noted the unequivocal legislative history, in which the legislative sponsor, Representative Barnie Frank, commented that, " . . . , 'the plaintiff would still have the right

to contest the certification if they [sic] thought the Attorney General were [sic] certifying without justification.' " *Id.* at 744.

Finally, the Ninth Circuit also alluded to the "troubling separation of powers issues" raised by the executive branch having the power to dictate the judicial branch's subject matter jurisdiction, and its due process concern that "leaving the final determination of scope to the Attorney General would allow an interested party to control a dispositive issue and would present possible due process implications." *Id.* at 744.

Similarly, *Hamrick v. Franklin, supra* note 1, was a defamation and tortious interference with contract action brought by employees of a veterans hospital in Madison, Wisconsin against fellow employees. Plaintiffs alleged that the defendants actions were outside the scope of employment, but the Attorney General's designee certified that the defendants were within their scope.

The court framed the issue as one of "whether the scope certification is subject to judicial review . . . ," *id.* at 1210, and, after noting the split in the circuits, held that "the better answer lies with the Circuits concluding that the scope determination is subject to judicial review." *Id.* at 1210. The Court reached this conclusion in reliance on the statutory language, the legislative history, and "potential separation of powers . . . concerns. . . . " *Id.* at 1211. Particular emphasis was laid on the Deputy Assistant Attorney General's representation in committee hearings that "at some point the certification would be reviewable by a court, 'probably a Federal District Court.' " *Id.* 1211. The Seventh Circuit concluded by noting, "[w]e

agree with the government and the plaintiffs here that based on the statutory language and the legislative history, the scope of certification is conclusive only with respect to *removal*, and the *district court has the power to review the certification*." *Id.* at 1211 (emphasis added).

In another defamation action, *S.J. & W. Ranch, Inc. v. Lehtinen, supra* note 1, a United States Attorney was sued for allegedly defamatory remarks uttered at a press conference. The Attorney General's designee certified that Lehtinen was acting within the scope of his employment. The District Court held that judicial review of the Attorney General's scope certification was foreclosed by the Westfall Act. The Eleventh Circuit reversed, holding certification was non-reviewable for purposes of removal only, because "the statute [28 U.S.C. § 2679(d)(2)], on its face, does not explicitly preclude judicial review of scope certification with respect to the substitution of the United States . . . ," and because the statute does expressly provide that "certification 'shall conclusively establish scope of office or employment *for purposes of removal*. . . . ' " *Id.* at 1540.

The *Lehtinen* court also relied on the legislative history, including the Justice Department's concurrence with Congressman Frank's understanding. " 'Chairman Frank is correct that a plaintiff can challenge that certification. So that would be reviewable by a court at some point, probably by a Federal District Court.' *Hearings, supra*, at 133; *Arbour*, 903 F.2d 421." *Id.* 1541. The Eleventh Circuit concluded, by quoting with approval from *Gogek v. Brown Univ.*, 729 F.Supp. 926, 933 (D.R.I. 1990), that "it is hard to imagine Congress empowering an executive officer, the Attorney General of the United States, to displace the

federal court as the final determiner of the scope of employment question, thus forcing a Federal Court to forego determination of its own jurisdiction, and preventing the plaintiff, by executive fiat, from pursuing a possibly legitimate claim in state court. . . . " 903 F.2d at 1541 and 1542.

> We share the First Circuit's observation that nothing in the regulations governing scope certifications requires the Attorney General "to conduct a neutral proceeding, open to all parties, before taking a final position on the scope question – the least one might have expected had Congress intended the Attorney General to substitute for the federal courts as the final arbiter of the controversy effecting both the parties' rights and liabilities and the courts jurisdiction."

Id.

Observing that granting the Attorney General such power would "raise due process concerns because such a statutory scheme would permit the Attorney General to arbitrarily deprive a plaintiff of a cause of action without a meaningful opportunity to be heard and other procedural safeguards . . . ," *id.* 1542, the *Lehtinen* Court ultimately held that "once in federal court a plaintiff is entitled to litigate the question of whether the employee was acting within the scope of his employment when the challenged conduct occurred." *Id.* 1542.

Other Circuits holding in accord have relied on similar reasoning. See generally, *Melo v. Hafer, supra* note 1, (a defamation and tortious interference with contract action against federal employees); *Nasuti v. Scannell, supra* note 1, (an assault and battery case against a federal employee); *Arbour v. Jenkins, supra* note 1, (a wrongful

death case against employees of the Detroit post office); and *Brown v. Armstrong*, 949 F.2d 1007 (8th Cir. 1991) (a tort action against employees of the Farmers Home Administration).

As the dissent in the case *sub judice* noted, "[t]wo Circuits, which decided the question earliest (one before the Department of Justice acknowledged its current position), have held to the contrary. *Mitchell v. Carlson*, 896 F.2d 128, 136 (5th Cir. 1990); *Aviles v. Lutz*, 887 F.2d 1046, 1048-49 (10th Cir. 1989)." Appendix, p. A19. Neither *Mitchell* (an assault and battery case against an Army officer), nor *Aviles* (a defamation and tortious interference with employment case against the Health and Human Services federal agency and its employees) addressed the distinction between reviewability of certification for purposes of removal and reviewability of certification for purposes of substitution; the commentary in the legislative history between Congressman Frank and various witnesses revealing the consensus view that certification would be reviewable; the fact that the Department of Justice concedes that the Attorney General's certification is reviewable; nor the due process or separation of powers concerns alluded to in the subsequent decisions discussed, *supra*.

II. THE FOURTH CIRCUIT ERRED IN HOLDING THAT ADMIRAL CARTER WAS WITHIN THE SCOPE OF HIS EMPLOYMENT.

The Fourth Circuit also held that, irrespective of reviewability of certification, the certification in this instance was proper, because Admiral Carter, in fact,

acted within the scope of his employment, when he used his rank and command authority to protect and defend the sensibilities of Mrs. Carter. The practical effect of that holding is to repeal carefully drawn Navy regulations which, first, set "Bedrock" minimum standards of conduct for Naval officers, and, second, decree that any conduct which falls beneath such standards be on the officer's "own responsibility." As such, the holding decides "an important question of federal law which has not been, but should be, settled by this Court. . . . " Supreme Court Rule 10(c).

The district court found that Admiral Carter acted outside the scope of his employment. As the dissent below noted, "[a]lthough the record presents us with significant factual disputes, we must affirm the district court's factual findings unless they are clearly erroneous."[2] Appendix, p. A31. The district court's finding was based on ample evidence, as described *supra* and in the dissenting opinion, and certainly was not clearly erroneous.

Under the Westfall Act, whether Admiral Carter was in or out of his scope turns on an application of Virginia scope of employment law. Virginia law (and Navy Regulations) holds that an employee is outside his scope of employment when he departs from his employer's orders or instructions.

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[2] See *McCluggage v. United States*, 392 F.2d 395, 397 (6th Cir. 1968) in which the court held "the scope of employment question is a factual one subject to review under a 'clearly erroneous' standard."

A. Admiral Carter Violated Navy Regulations and Consequently Acted Outside the Scope of His Employment.

Admiral Carter concedes that Navy regulations constitute part of his controlling "orders and instructions." Appendix, pp. A103 and A104. Navy Regulation, 32 C.F.R. § 721.18, entitled "Bedrock Standards of Conduct for Department of the Navy Personnel," state, *inter alia:*

> (c) Do not engage in any activity . . . which results in a conflict between your private interest and the public interest of the United States related to your duties.
>
> (d) Do not engage in any activity that might result in or reasonably be expected to create the appearance of a conflict of interest.

32 C.F.R. § 721.18(c) and (d).

Further, Navy Regulation, 32 C.F.R. § 700.702(b) makes commanding officers personally responsible for violation of this and other "Bedrock" standards of conduct.

> A commanding officer who departs from his orders or instructions, or takes official action which is not in accordance with such orders or instructions, *does so upon his own responsibility* . . . .

32 C.F.R. § 700.702(b), (emphasis added).[3]

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[3] See also 10 U.S.C. 933; 32 C.F.R. § 700.1201; Navy Regulations, Article 0814; Uniform Code of Military Justice, Article 133.

The forgoing regulations are directly applicable to the case *sub judice*, because they mandate that an officer who engages in any activity which results in a conflict between his private interest and the public interest of the United States does so upon his "own responsibility." By ignoring these Navy regulations, the court below violated this Court's oft cited proscription against "second-guess[ing] military decisions. . . . " *United States v. Shearer*, 473 U.S. 52 (1985).

Given the substantial evidence, discussed *supra*, that Admiral Carter acted solely at his wife's behest, the district court had ample basis for finding that Carter acted in his capacity as an irate father and husband, rather than as Commander in Chief of the Atlantic Fleet. As such, the Admiral created a conflict between his private interest and the interest of the United States, 32 C.F.R. § 721.18(c) and consequently acted "*upon his own responsibility* . . . . " (32 C.F.R. 700.702(b) emphasis added).

B. Violation of Instructions Takes an Employee Out of the Scope of Employment Under Virginia Law.

Relying on *Kensington Associates v. West*, 234 Va. 430, 362 S.E.2d 900 (1987),[4] the Fourth Circuit adopted Admiral Carter's argument that Virginia law recognizes a dual

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[4] The Fourth Circuit relied on Virginia scope of employment law, because the scope issue is governed by the law of the state where the wrong occurred. *Williams v. United States*, 350 U.S. 857, 76 S. Ct. 100 (1955); H.R. Rep. No. 100-700, 100th Cong., 2d Sess. 5, *reprinted in* 1988 U.S. Code Cong. & Admins. News.

purpose doctrine under which an employee acts within the scope of his employment when he acts partly out of personal motives and partly to advance the interests of his employer.

In *Kensington* a security guard accidentally shot a construction worker while the security guard engaged in horseplay on the job. The security guard had been specifically instructed by his employer not to meddle with the construction workers. Even though the security guard (unlike Admiral Carter) was actually at work and in the process of performing his regular duties when the tort occurred, the Virginia Supreme Court held the security guard acted *outside* of his scope of employment, because the guard had " 'embarked upon an independent venture to satisfy his own personal desire to have "fun" and "play" around.' *Id.* at 903." As the dissent below pointed out Kensington "hardly support[s] the creation of a 'dual purpose doctrine.' " Appendix, p. A36.

Like *Kensington*, the cases cited in *Kensington* hold that, in Virginia, an act committed in direct contravention of an employer's instructions is, *per se*, beyond the scope of employment. The principle is most frequently encountered in vehicle cases: *McNeill v. Spindler*, 191 Va. 685, 62 S.E.2d 13 (1950), (delivery man deemed out of the scope of his employment, because he violated employer's specific instructions concerning where to drive the truck); *Connor v. Bragg*, 203 Va. 204, 123 S.E.2d 393 (1962) (gas station employee took it upon himself, in violation of employer's instructions, to attempt to operate a front end loader with which he was unfamiliar and held out of scope); *Meek v. Graybeal*, 195 Va. 381, 78 S.E.2d 593 (1953), (eleven year old employee was held to be outside of

scope for operating a jeep at work without permission, even though he clearly acted in an attempt to further his employer's business); and *Master Auto Serv. Corp. v. Bowden*, 179 Va. 507, 19 S.E.2d 679 (1942) (truck driver deviated from prescribed route held outside the scope).

The principle has also been applied in at least one Virginia defamation case. In *Thalhimer Bros. v. Shaw*, 156 Va. 863, 159 S.E. 87 (1931), a defendant employee was held outside of his scope when the employee, whose job it was to examine packages in the possession of other employees leaving the store, had acted beyond his authority in placing store property in a package owned by a co-employee, and subsequently charging that employee with theft. Unlike Admiral Carter, the Thalhimer tort-feasor was on duty and at work when he defamed his fellow employee, yet he was still held beyond his scope.

Federal decisions also hold that government employees who depart from instructions or regulations are outside the scope of their employment. *United States v. Alexander*, 234 F.2d 861 (4th Cir. 1956), *cert. den.* 352 U.S. 892, 1 L.Ed.2d 86, 77 S. Ct. 131 (Air Force lieutenant beyond scope, because, in violation of Air Force regulations, he authorized a civilian to fly as a passenger in an Air Force aircraft); *White v. Hardy*, 678 F.2d 485 (4th Cir. 1982) (Army truck driver out of scope when accident occurs because driver was not given permission to use the government vehicle to make off post personal telephone call); and *Witt v. United States*, 319 F.2d 704 (9th Cir. 1963) (Army pilots outside of their scope because they deviated from their course of flight to do practice touch-and-go landings, some of which were for training

purposes and others of which were for the entertainment of bystanders). Federal cases too apply the rule to non-vehicle factual settings. *Green v. James*, 473 F.2d 660 (5th Cir. 1973).

In holding the Admiral in his scope, the majority below emphasized that an admiral is an admiral twenty-four hours a day, seven days a week, both in and out of his office or command post. This is undisputed. The issue is whether it is within an Admiral's scope to issue military orders at the behest of his wife, irrespective of whether he is then situated on the bridge of a destroyer overlooking a battery of armed Tomahawk missiles, or in his garden overlooking a row of home grown tomatoes.

Likewise, the Fourth Circuit's reliance on the analogy to the judge who signs a temporary restraining order at home on a weekend misses the point. Certainly, a judge can properly sign a decree at home, but it is not within the scope of a judge's employment to sign a contested decree, even from the bench, if one of the party litigants is that judge's spouse.

C. Disqualification

> (a) A Judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> To this end, he should abstain from performing or taking part in any judicial act in which his personal interests are involved. *He should not act in a controversy where a near relative is a party.* He should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by his kinship, rank,

> position or influence of any party or other person. * * *

Rules of the Supreme Court of Virginia, Pt. 6, § III, "Canons of Judicial Conduct for the State of Virginia," Cannon 3C(a) (emphasis added).

A more apt analogy is demonstrated by a hypothetical reversal of Johnson's and Carter's roles. If Admiral Carter had cursed Officer Johnson's wife on a base street, and if Officer Johnson (who of course is a police officer twenty-four hours a day) had consequently arranged to have the Admiral spirited to Officer Johnson's garden for an impromptu, Sunday afternoon tutorial on the misdemeanor of curse and abuse, it is inconceivable that any court would seriously entertain argument that Johnson was acting within his scope as a federal police officer.

Most troubling to the majority below seemed to be an apprehension that making military commanders accountable for abuses of authority outside the scope of their employment will somehow undermine military discipline. The Navy itself shares no such misapprehension; witness Navy Regulation 700.702.(b) providing that "[a] commanding officer who departs from his orders or instructions . . . does so upon his own responsibility . . . ," 32 C.F.R. § 700.702(b).

The court below cites no recognized authority on matters military in support of its assumption that countenancing extra-military abuses of military authority somehow enhances order and discipline in the ranks. To the contrary, it is well appreciated by the most distinguished of military authorities that respect for, not abuse of, the

dignity of subordinates is what makes for a well disciplined fighting force.

> The unfailing formula for production of morale is patriotism, self-respect, discipline, and self-confidence within a military unit, joined with fair treatment and merited appreciation from without. . . . It will quickly wither and die if soldiers come to believe themselves the victims of indifference or injustice on the part of their government, or of ignorance, personal ambition, or ineptitude on the part of their military leaders.

General Douglas MacArthur, "Annual Report of the Chief of Staff, U.S. Army, for the Fiscal Year Ending June 30, 1933" (emphasis added).

CONCLUSION

The Fourth Circuit erred in holding that the Attorney General's certification of scope is non-reviewable for purposes of substitution, and that Admiral Carter acted within the scope of his employment. For these reasons, and because significant unresolved issues are presented, this petition for writ of certiorari should be granted.

Respectfully submitted,

JEREMIAH A. DENTON III
Attorney for Petitioner

DATED: March 31, 1993

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

WILLIAM D. JOHNSON, *Plaintiff-Appellee,* v. POWELL F. CARTER, *Defendant-Appellant,* UNITED STATES OF AMERICA, *Appellant.*	No. 90-3077

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
John A. MacKenzie, Senior District Judge.

(CA-89-784-N)

Argued: December 3, 1991

Decided: January 15, 1993

Before ERVIN, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, WILKINSON, WILKINS, NIEMEYER, HAMILTON and LUTTIG, Circuit Judges, and SPROUSE, Senior Circuit Judge.

Reversed and remanded with instructions by published opinion. Judge Widener wrote the opinion, in which Judge Russell, Judge Hall, Judge Wilkinson, Judge

Wilkins, Judge Niemeyer, Judge Hamilton and Judge Luttig joined. Senior Judge Sprouse wrote a dissenting opinion in which Chief Judge Ervin, Judge Phillips and Judge Murnaghan joined.

COUNSEL

ARGUED: Michael Eugene Robinson, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellants. Jeremiah A. Denton, III, Virginia Beach, Virginia, for Appellee. **ON BRIEF:** Stuart M. Gerson, Assistant Attorney General, Barbara L. Herwig, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Henry E. Hudson, United States Attorney, Norfolk, Virginia; Richard F. Walsh, OFFICE OF THE JUDGE ADVOCATE GENERAL OF THE NAVY, Alexandria, Virginia, for Appellants.

OPINION

WIDENER, Circuit Judge:

Admiral Powell F. Carter, Jr., former Commander-in-Chief[1] of the Atlantic Fleet, appeals from the district court's decision denying his motion to substitute the United States as the sole defendant under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the Westfall Act).[2] We reverse.

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[1] At all times relevant to this dispute, Admiral Carter was the Commander-in-Chief of the Atlantic Fleet. He retired in 1991.

[2] In addition, Admiral Carter appeals the district court's decision denying his motion to dismiss the case based on the

I.

On June 18, 1989, Admiral Carter's daughter, Janeen Carter, visited her father at his home on the Norfolk Naval Base. When she left, her mother, Admiral Carter's wife, Carole Carter, escorted her off the base. Janeen followed in her own vehicle, William D. Johnson, a police officer patrolman at the base, pulled over Janeen Carter for speeding.[3] When Johnson requested base identification, Janeen produced a four-star placard. Carole Carter circled back behind Officer Johnson's car and got out of her car. Johnson directed Mrs. Carter back to her car. He then gave Janeen Carter a warning and sent her on her way. Janeen proceeded off the base. Johnson then went to Mrs. Carter's car and informed her that a warning had been issued to her daughter. According to Janeen and Mrs. Carter, Johnson was rude and intimidating to them during the stop. Upon her return home, Mrs. Carter told her husband what had happened and gave him the vehicle number of Officer Johnson's car.

Admiral Carter, who had been concerned about the conduct of base police officer for some time, sought to identify the officer involved so that he could file a formal complaint concerning the incident. After unsuccessfully

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military immunity doctrine set forth in *Feres v. United States*, 340 U.S. 135 (1950). Also, Admiral Carter raises on appeal the issue that the Civil Service Reform Act (CSRA) preempts state common law remedies for employment related activities such as this.

Because of our resolution of the Westfall Act issue, we do not decide the *Feres* or CSRA issues.

[3] According to Johnson, his radar equipment clocked Janeen Carter at 40 m.p.h. in a 25 m.p.h. zone.

attempting to reach the Commander of the Naval Base and the Commanding Officer of the Naval Station, Carter phoned the duty petty officer of the Naval Station and asked that the duty officer, the patrolman involved and his supervisor from the Naval Base Security Force report to his quarters so that the Admiral could identify the patrolman.

Admiral Carter was working in the garden at his home when the three officers arrived at the Admiral's house. Admiral Carter told Johnson's supervisor, Major G.K. Maynard, that something needed to be done about the discourtesy of the base police. After Maynard identified Johnson as the patrolman in question, Admiral Carter related to Johnson his wife's account of what had happened and asked Officer Johnson if he had been rude to Mrs. Carter and their daughter. Johnson replied, "No, sir." According to Officer Johnson, Admiral Carter responded, "You are a liar." The Admiral then directed Maynard to instruct Officer Johnson on how to properly conduct himself. Admiral Carter also informed Maynard that he intended to file a formal complaint against Johnson. The three officers were then dismissed.

The next day, Admiral Carter lodged a formal complaint against Officer Johnson. The incident was reported in a local newspaper, the *Virginian Pilot/Ledger Star.* Admiral Carter made no statements to the newspaper and instructed his staff not to make any comments to the press. After an investigation, the Naval Base Security Force recommended and approved a two-day suspension for Johnson. Upon arbitration at Johnson's instance, the disciplining of Johnson was affirmed, but the suspension was reduced to a letter warning.

In October 1989, Officer Johnson filed an action against Admiral Carter in the Circuit Court of the City of Norfolk, Virginia, seeking $500,000 in compensatory damages and $1,000,000 in punitive damages for slander, libel, insulting words, intentional infliction of emotional distress, and tortious interference with contractual and business relations.[4] Admiral Carter then moved to have the case removed to federal district court pursuant to 28 U.S.C. § 1442 and 28 U.S.C. § 2679(d)(2) and have the United States substituted as the sole defendant.[5] The United States Attorney certified that Admiral Carter was acting within the scope of employment when the alleged torts occurred. The case was removed to the United States District Court for the Eastern District of Virginia. The district court denied the motion to substitute the United States as the sole defendant. Admiral Carter filed a renewed motion to substitute the United States as the sole defendant. The district court treated this pleading as a motion for reconsideration and denied it. Admiral Carter sought and was granted a stay of the district court's order pending resolution of the appeal.

On appeal, a divided panel of this court upheld the district court's decision. *Johnson v. Carter*, 939 F.2d 180 (4th Cir. 1991). We then granted rehearing en banc and

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[4] Johnson subsequently reduced his claims to $60,000 in compensatory damages and $40,000 in punitive damages.

[5] A petition for removal was filed requesting removal under "Section 1442," which was amended to claim removal under "Sections 1442a and 2679(d)(2)." Another motion moved for the substitution of the United States as the defendant instead of Admiral Carter.

vacated the panel opinion. *Johnson v. Carter*, 939 F.2d at 191. *We now reverse.*

II.

Admiral Carter argues that the United States should have been substituted as the sole defendant in the action pursuant to 28 U.S.C. § 2679(d)(1) (the Westfall Act).[6] We

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[6] The Westfall Act provides in pertinent part:

> (1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.
>
> (2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purpose of removal.

28 U.S.C. § 2679(d)(1)(2).

Congress passed the Westfall Act to change the rule set out in the Supreme Court's decision in *Westfall v. Ervin*, 484 U.S. 292

agree. By the plain language of 28 U.S.C. § 2679(d)(2), no discretion is given to the district court. If the Attorney General certifies that the defendant employee was acting within the scope of his employment, "the United States *shall* be substituted as the party defendant." 28 U.S.C. § 2679(d)(2) (emphasis added).

The Department of Justice, which once advocated that the Attorney General's certification was conclusive, now takes the position that the certification of scope of office or employment is reviewable. It has apparently also taken an intermediate position. *Nasuti v. Scannell*, 906 F.2d 802, 812 (1st Cir. 1990). The Circuits are divided regarding this issue. The First, Third, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits follow the course taken by the district court and do not give conclusive effect to the Attorney General's determination.[7] These courts base

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(1988). In *Westfall*, the Court held that the judicially created doctrine of official immunity did not provide blanket protection to government employees for torts committed in the scope of their employment. The Westfall Act grants immunity to government employees acting within the scope of their employment by requiring persons injured by them to substitute the government as the defendant. The remedy against the government is exclusive. Any other civil action or proceeding for money damages against the employee, arising out of or relating to the same subject matter with two exceptions not relevant here, is precluded. 28 U.S.C. § 2679(b).

[7] See *Brown v. Armstrong*, 949 F.2d 1007 (8th Cir. 1991); *Meridian Int'l Logistics, Inc. v. United States*, 939 F.2d 740 (9th Cir. 1991); *Hamrick v. Franklin*, 931 F.2d 1209 (7th Cir. 1991), cert. denied, 60 U.S.L.W. 3262 (1991); *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538 (11th Cir. 1990), modified, 924 F.2d 1555 (11th Cir. 1991), cert. denied, 60 U.S.L.W. 3257 (1991); *Melo v. Hafer*, 912 F.2d 628 (3d Cir. 1990), *aff'd on other grounds*, 60 U.S.L.W. 4001

their decisions, in part, on legislative history and what they perceive as ambiguity in the statute. 28 U.S.C. § 2679(d)(2), the portion of the Westfall Act dealing with cases commenced in the state courts, concludes by providing that "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal." There is no similar provision in 28 U.S.C. § 2679(d)(1), the portion of the Act dealing with cases commenced in the federal courts. Upon this claimed ambiguity,[8] the court typically would then look to the legislative history and find that Congressman Frank, the Act's sponsor, stated that "the plaintiff would still have the right to contest the certification if they [sic] thought

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(1991); *Nasuti v. Scannell*, 906 F.2d 802 (1st Cir. 1990); *Arbour v. Jenkins*, 903 F.2d 416 (6th Cir. 1990).

Some of these courts believed there would be potential separation of powers problems if the Attorney General's scope certification was given conclusive effect. We do not agree.

We have held that, over like objections, in ordinary circumstances, a reduction in sentence for assisting the government can only occur upon motion of the government as stated in the sentencing guidelines. *United States v. Francois*, 889 F.2d 1341 (4th Cir. 1989), cert. denied, 494 U.S. 1085 (1990). We found no separation of powers problem with vesting absolute discretion in the prosecutor in deciding whether to file a motion or not in the more compelling circumstance of assertion of a criminal defendant's rights, so it follows that the same objection should be held without merit in the context of a civil case.

[8] A logical flaw in that reasoning is at once apparent. Section (d)(1) does not deal with removals, so it has nothing to do with cases filed in the state court. Also, cases filed in the federal courts, of course, require no removal. In the same vein, we do not agree with the reasoning of the court which found the "plain language" of § 2679 "comports" with non-reviewability, *Brown*, at 1011, but then found the statute ambiguous.

the Attorney General were [sic] certifying without justification." *Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary*, 100th Cong., 2d Sess. 60, 128 (April 14, 1988), cited in *Meridian Int'l Logistics, Inc. v. United States*, 939 F.2d at 744. In addition, the court would rely upon a Department of Justice representative, Deputy Assistant Attorney General Robert Willmore, who appeared at a Congressional hearing and stated that "Chairman Frank is correct that a plaintiff can challenge that certification. So that would be reviewable by a court at some point, probably by a Federal District Court." *Legislation to Amend the Federal Tort Claims Act: Hearing*, at 133, cited in *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d at 1541. The Fifth and Tenth Circuits, however, follow Congress's express language instead of the legislative history and give conclusive effect to the Attorney General's certification. See *Mitchell v. Carlson*, 896 F.2d 128 (5th Cir. 1990); *Aviles v. Lutz*, 887 F.2d 1046 (10th Cir. 1989).

We are of opinion that the district court erred in not giving conclusive effect to the Attorney General's scope certification. We do not agree with the Department of Justice's latest position and, with respect, with those courts which rely on legislative history in determining that the Attorney General's scope certification is not conclusive. We are of opinion that "[l]egislative history is irrelevant to the interpretation of an unambiguous statute." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808-09 n.3 (1989). As we have recently stated,

> Congress enacted [the statute], not its accompanying legislative reports. We have no authority to limit the scope of a clear statutory term by recourse to the views of a legislative subgroup.

In re Moore, 907 F.2d 1476, 1479 (4th Cir. 1990). In the instant case, the language of the statute is clear and unambiguous. If the Attorney General certifies that the defendant employee was acting within the scope of his employment, "the United States *shall* be substituted as the party defendant." 28 U.S.C. § 2679(d)(2) (emphasis added). That language, we suggest, is hardly ambiguous.

III.

In any event, even if the certification should not be conclusive in all cases (which we do not intimate), it must be treated as conclusive in a case such as this where a military officer is inquiring into a report to him concerning improper performance of duty. The manner in which Admiral Carter performed his duty should not be subject to review by a civil court under the Westfall Act upon proper certification, as here, and that is what the Westfall Act is all about. We are of opinion that it should be, and it is, entirely within the province of Congress to provide, as it has, that the employment of certain officers and servants of the United States, such as Admiral Carter, is of such importance to the nation that their acts within the scope of their office or employment are shielded from liability unless Congress has specifically provided otherwise. It is entirely within the province of Congress to provide that the certification of the Attorney General conclusively establishes not only the scope of office or employment for the purposes of removal but also conclusively establishes that "[u]pon certification" "such

action" "shall be deemed to be an action . . . brought against the United States." 28 U.S.C. § 2679(d)(2). In addition, it is well within Congress's power to provide, as it has, that "[a]ny other civil action or proceeding [except under § 1346(b) and § 2672] for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred." 28 U.S.C. § 2679(b)(1).

An analogy close to home illustrates the point. 28 U.S.C. § 452 provides that the courts of the United States will always be in session. There is hardly a lawyer who has not in practice applied for and received injunctive or other like extraordinary relief from a judge, state or federal, at his home, and not on the bench or in his office. The hour of the day or night does not make a difference, nor do Saturdays, Sundays, or holidays, as we all know. A judge, when at home, can issue an order of unquestionable validity. In *Cunningham v. Neagle*, 135 U.S. 1 (1890), the Supreme Court discussed the principle at issue here.

> Important cases are often argued before the judge at any place convenient to the parties concerned, and a decision of the judge is arrived at by investigations made in his own room, wherever he may be, and it is idle to say that this is not as much the performance of judicial duty as the filing of the judgment with the clerk, and the announcement of the result in open court.

135 U.S. at 56. The Court, without benefit of a statute, discharged from state custody the deputy marshal who was held on a state murder charge for killing an assailant

apparently bent upon taking the life of Mr. Justice Field. The incident took place in the dining car of a train between Los Angeles and San Francisco while Mr. Justice Field was going from one place of holding court to another. But since, in the words of the Court, important cases may be decided in a judge's "own room" wherever he may be and this, "in the performance of judicial duty", the Court held that Mr. Justice Field was engaged in the discharge of his judicial duties, 135 U.S. at 58, when the deputy marshal, who was charged with the duty of protecting the Justice, killed the assailant. 135 U.S. at 69.

Clearly then, Admiral Carter, as an officer of the executive branch, can take precisely the same action as can officers of the judicial branch. Admiral Carter's reprimand, which indisputably would have been valid if administered during the work week in Admiral Carter's office and pursuant to regulation as the panel majority freely admits at 939 F.2d 185, is not invalid merely because it was administered in the Admiral's garden at Norfolk Naval Base. A decision to the contrary would serve to hamstring one of the principal officers of the United States in the performance of his duty.

IV.

In any event (and again assuming that the scope of employment certification is reviewable, which we do not intimate), the district court erred in concluding that Admiral Carter's actions were outside the scope of employment. The determination of whether an employee's actions were within the scope of employment is to be determined according to the *respondeat superior*

rules of the State, in this case Virginia, in which the alleged tort occurred. *Williams v. United States*, 350 U.S. 857 (1955) (per curiam); *Brown v. Armstrong*, 949 F.2d 1007, 1012 n.7 (8th Cir. 1991). In Virginia, once the employment relationship has been established (and it is conceded here), the party opposing a finding of *respondeat superior* has the burden of proving the employee was outside of the scope of employment when the incident occurred. See, e.g., *Slaughter v. Valleydale Packers, Inc.*, 198 Va. 339, 343-44, 94 S.E.2d 260, 263-64 (1956); *Alvey v. Butchkavitz*, 196 Va. 447, 453, 84 S.E.2d 535, 539 (1954) ("We have repeatedly held that where the relationship of master and servant has been established the burden is on the master to prove that the servant was not acting within the scope of his employment when he committed the act complained of. . . . "); *Crowell v. Duncan*, 145 Va. 489, 501, 134 S.E. 576, 579 (1926) ("Where it is doubtful whether a servant in injuring a third person was acting within the scope of his authority, the doubt will be resolved against the master. . . . "). Admiral Carter established that he was employed by the United States. Therefore, the burden was on Johnson to prove that Admiral Carter's actions were outside of the scope of employment. In not applying Virginia law as just stated, to place the burden of proof on Johnson, the district court erred.

In Virginia an act is deemed to be within the scope of employment if:

> (1) it was expressly or impliedly directed by the employer, or is naturally incident to the business, and
>
> (2) it was performed, although mistakenly or ill-advisedly, with the intent to further the

> employer's interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employer's business, "and did not arise wholly from some external, independent, and personal motive on the part of the [employee] to do the act upon his own account."

Kensington Assoc. v. West, 234 Va. 430, 432, 362 S.E.2d 900, 901 (1987) (citations omitted).

It cannot be said from anything in this record that Admiral Carter's summoning of a base police officer arose "wholly from some external, independent, and personal motive" on his part. Undisputed contemporaneous written records corroborate that Admiral Carter had previously and consistently expressed his displeasure with the conduct of the base police, and that he took action to remedy the situation. Upon taking command of the Atlantic Fleet, Admiral Carter became aware of problems with the quality of life of naval personnel on the bases around Norfolk and attempted to improve the situation. The conduct of the base police had been a concern of his for quite some time. As early as November 16, 1988, he expressed his concerns to Rear-Admiral Pappas about reports he had heard concerning rude conduct by base police. He expressed those concerns on numerous occasions. On November 22, 1988, Admiral Carter noted that Rear Admiral Pappas "[t]old me results [of] looking into discourtesy. . . . Stories on police hard to pin down. Not many H.L. complaints. People may feel its their word against police so its no use." On February 2, 1989, Carter noted that he had told Pappas that "MG Doran USAF is *another* who had had probs w/ police discourtesy to his guests on base. Realize *many* of police are great, but

evidence is there are a few out of line. Need identify + correct." (italics in original) Carter's notes indicate an increasing level of frustration with the inability to correct the problems of police rudeness because of difficulties in identifying the personnel who were causing the problems. Therefore, it is not surprising that he took direct and immediate action when his wife was able to identify a policeman who had acted rudely.

The district court gave great weight to the fact that the incident occurred while Admiral Carter, dressed in civilian clothes, was working in his garden. Where and when Admiral Carter exercises his authority are of no moment, however. By Navy Regulations, Admiral Carter, while on active service, is "at all times subject to naval authority" and "may . . . exercise authority over all persons who are subordinate to [him]." 32 C.F.R. § 700.811(a) (1990). Therefore, Admiral Carter had the authority to summon a base police officer at any time. If he so chose, Admiral Carter could direct movements of the Atlantic Fleet from his garden, dressed in civilian clothing. His attire and location do not determine whether his acts were within the scope of his authority. He patently had the authority to summon Johnson to his home and he exercised that authority.

The alleged tortious incident cannot be looked at in isolation from the context in which it occurred. As we stated in *Wallen v. Domm*, 700 F.2d 124 (4th Cir. 1983), a pre-Westfall Act common law immunity case:

> Few government authorities are authorized to commit torts as part of their line of duty, but to separate the activity that constitutes the

> wrong from its surrounding context – an otherwise proper exercise of authority – would effectively emasculate the immunity defense. Once the wrongful acts are excluded from an exercise of authority, only innocuous activity remains to which immunity would be available. Thus, the defense would apply only to conduct for which it is not needed.

700 F.2d at 126. We also made clear that "[a]pplication of the immunity is not affected by whether the injury was committed in good faith, negligently, or even intentionally." 700 F.2d at 126.

The district court "found it incredible that the United States Attorney could make an affidavit that the words of the Admiral that the policeman who had stopped the Admiral's daughter for speeding was 'a liar,' were words spoken while the Admiral was acting within the scope of his employment as an employee of the United States." But the district court erroneously looked at the words spoken in isolation from the surrounding acts. As *Wallen* makes clear, the appropriate question is, was the underlying conversation between Johnson and Admiral Carter "an otherwise proper exercise of authority" by Admiral Carter, not whether Admiral Carter spoke improperly during the conversation.

In *Barr v. Matteo*, 360 U.S. 564 (1959), the Supreme Court stated it is "the relation of the act complained of to 'matters committed by law to his control or supervision' – which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits." 360

U.S. at 573-74 (citation omitted). Control of the base policies was a matter committed by law to Admiral Carter's control or supervision, therefore, his activities with respect to this were within the scope of his employment.

The district court also erred in holding that "to substitute the United States as the sole defendant, and to then dismiss the plaintiff's claims . . . [would] completely ignore any semblence [sic] of constitutional 'due process' to the plaintiff on his claim of alleged slander and libel."[9] The Supreme Court, in *United States v. Smith*, 59 U.S.L.W. 4201 (1991), while it did not phrase its reasoning in constitutional terms, expressly rejected recovery on that very account and held that government employees are immunized from suit "even when an FTCA exception precludes recovery against the Government." 59 U.S.L.W. at 4202.

This case involves much more than merely the construction of the federal statute and the Virginia law on scope of employment. It has to do with the ability and obligation of one of the principal officers of the United States to perform his duty unhampered by having to answer for the same in a civil court. No one can seriously contend that Admiral Carter would not have the authority to order the movement of ships and aircraft from the

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[9] The United States has not waived its sovereign immunity in defamation actions. Therefore, if the government is substituted as the sole defendant judgment must be entered against the plaintiff. 28 U.S.C. § 2620(h).

Smith, we note, was decided after the district court's decision.

same garden involved here (which is owned by the government) at the Norfolk Naval Base at any hour of the day or night, on any day of the week, for, pursuant to navy Regulations "while on active service" he might "exercise authority over all persons who are subordinate" to him. It is just as true that Admiral Carter had authority over the base policeman of Norfolk Naval Base who is involved in this case. This is not contested and is acknowledged in the decision of the district court. Since Admiral Carter had authority to control the base policeman in the performance of his (Admiral Carter's) duty, then he had the authority to perform that duty other than in a manner entirely in accord with public sensibilities (even if the words charged were uttered, which is admitted for argument.)

We are of opinion and so hold that Admiral Carter was acting within the scope of employment when the incident occurred. The district court erred in holding to the contrary.

Accordingly, the decision of the district court appealed from must be reversed, and the case remanded with instructions to substitute the United States as the party defendant and then to enter judgment in the case in favor of the United States, it not having waived its sovereign immunity for this type of claim.

REVERSED AND REMANDED
WITH INSTRUCTIONS

SPROUSE, Senior Circuit Judge, dissenting:

I respectfully dissent.

I

My strongest disagreement with the majority opinion is with its holding that the Attorney General's certification of scope of employment for purposes of substituting the United States as the defendant is conclusive, and thus defies judicial review. My view is influenced to a degree by concessions by the Department of Justice on behalf of Admiral Carter that the certification is subject to review by United States district courts. I also find precedent from seven United States courts of appeal to that same effect persuasive.[1] Even apart from this overwhelming precedential support, I cannot conclude from an objective analysis that Congress, when enacting 28 U.S.C. § 2679(d)(2), intended to interfere with the judiciary's prerogative to decide questions of jurisdiction. To me, it is disturbing that the majority opinion denies to courts the authority to review decisions of the executive branch's legal office – particularly where, as here, its decisions determine litigation in which it is an interested

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[1] *Brown v. Armstrong*, 949 F.2d 1007, 1010-11 (8th Cir. 1991); *Meridian Int'l Logistics, Inc. v. United States*, 939 F.2d 740, 743-45 (9th Cir. 1991); *Hamrick v. Franklin*, 931 F.2d 1209, 1210-11 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 200 (1991); *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1540-42 (11th Cir. 1990), *modified*, 924 F.2d 1555 (11th Cir.), *cert. denied*, 112 S. Ct. 62 (1991); *Melo v. Hafer*, 912 F.2d 628, 640-42 (3d Cir. 1990), *aff'd on other grounds*, 112 S. Ct. 358 (1991); *Nasuti v. Scannell*, 906 F.2d 802, 812-13 (1st Cir. 1990); *Arbour v. Jenkins*, 903 F.2d 416, 421 (6th Cir. 1990).

Two circuits, which decided the question earliest (one before the Department of Justice acknowledged its current position), have held to the contrary. *Mitchell v. Carlson*, 896 F.2d 128, 136 (5th Cir. 1990); *Aviles v. Lutz*, 887 F.2d 1046, 1048-49 (10th Cir. 1989).

party. Quite apart from possible constitutional problems of separation of powers and due process, which, in my opinion, the majority has too quickly dismissed, all of the traditional interpretive tools point to the conclusion that Congress intended in 28 U.S.C. § 2679(d)(2) to avoid this unsavory appearance of unfairness by subjecting the Attorney General's certification to judicial review.

A

In the first place, the unambiguous language of the statute should dispose of the question. Section 2679(d)(1) applies to cases filed in federal district courts, while section (d)(2) applies to those filed in state courts. *Both* sections provide: "Upon certification . . . the United States *shall* be substituted as the party defendant" (emphasis added). In addition, section (d)(2) provides: "Upon certification . . . [the claim] *shall* be removed . . . to the district court" (emphasis added). Thus, in federal cases the result of certification is substitution, while in state cases it is substitution plus removal. Notably, the only mention of *nonreviewability* pertains to removal: "The certification of the Attorney General shall conclusively establish scope of office or employment *for purposes of removal.*" 28 U.S.C. § 2679(d)(2) (emphasis added). Clearly, then, only certification for purposes of removal is nonreviewable; certification for purposes of substitution remains subject to judicial review.

There are only two ways to view the majority's reading of this language. One interpretation is that they have

added words to the sentence to make it read: "The certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal *and for purposes of substitution.*" Alternatively, they have interpreted "shall" in "shall be substituted" and "shall be removed" as meaning "nonreviewable," thereby rendering the last sentence of (d)(2) superfluous and meaningless.

B

It is apparent from the unambiguous language of the statute that the majority's interpretation is wrong. Even if the language were equivocal, however, and an examination of legislative history and congressional intent were required, my conclusion would be the same. Congressional rationale in differentiating between the effect of certification as it relates to removal, on the one hand, and its effect on substitution, on the other, was pointed out by the Eighth Circuit in *Brown v. Armstrong*, 949 F.2d 1007 (8th Cir. 1991). The court noted that substitution will often end the plaintiff's case – as it will here. However, "[t]he same concerns do not exist with automatic removal, which changes only the forum and not the substance of the case." *Id.* at 1011. The Third Circuit has explained the significant policy reasons for Congress to give the government an unchallenged right to a federal forum for tort suits brought against its employees (removal), while noting that no similar policy reasons exist for making the Attorney General's substitution decision unreviewable.

> Historically, the government has generally preferred to have litigation which it or its employees are defending in the neutral confines of federal courts. For example, a similarly "absolute" right of removal is provided by 28 U.S.C. § 1442(a)(1) whenever a suit against a United States officer is filed in a state court for any act "under color of [federal] office" because, as the Supreme Court has explained, "Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum."

Melo v. Hafer, 912 F.2d 628, 641 (3d Cir. 1990) (quoting *Willingham v. Morgan*, 395 U.S. 402, 407 (1969)), *aff'd on other grounds*, 112 S. Ct. 358 (1991).

This reasoning, and other rationale supporting a holding that certification is conclusive for purposes of removal but judicially reviewable for purposes of substitution, are not novel. It has been the position of the Department of Justice at least since early 1990,[2] and represents the opinion of seven of the nine federal courts of appeals entertaining the issue. Perhaps the most comprehensive discussion is found in the Eleventh Circuit's 1990 decision in *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1540-42 (11th Cir. 1990), *modified*, 924 F.2d 1555 (11th Cir.), *cert. denied*, 112 S. Ct. 62 (1991). *Lehtinen* exhaustively expresses the rationale of the majority of the other circuits:

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[2] *See Petrousky v. United States*, 728 F. Supp. 890, 891 (N.D.N.Y. Jan. 16, 1990) (discussing new Department of Justice guidelines).

> Our review of this [legislative history of § 2679(d)(2)] persuades us that the district court's interpretation was in error. During the hearings before the House Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, Subcommittee Chair Frank, a sponsor of the bill, expressed his understanding that under section 2679(d)(2) a "plaintiff can still contest the certification. . . . " *See Arbour v. Jenkins*, 903 F.2d 416, 421 (6th Cir. 1990). Representative Frank elaborated:
>
> I mean that [this bill] is not going to void the [certification] litigation. It seems to me the certification is a weapon against the employee, not against the plaintiff, because *the plaintiff would still have the right to contest the certification if they thought the Attorney General were certifying without justification.*

This understanding of the bill was reiterated in a colloquy with Lois Williams, Director of Litigation at the National Treasury Employees Union.

> Frank: [E]ssentially the judge is deciding the case. One of the issues for the judge is going to be to decide [certification] . . . because you might have a third route. It is conceivable – I cannot think of too many cases – where the plaintiff might not want the Government in there.
>
> Williams: That is right.
>
> Frank: So the plaintiff might object to the argument and the Government might certify. But that would not be binding on the plaintiff. The plaintiff would, I assume, have the right to go into court and say, baloney, it was not within the

> scope of employment, either because of some immunity issue or because you really hated that defendant and you wanted to get them.
>
> Williams: Yes. In fact, that is the way it frequently has arisen in the past.

Representative Frank's understanding that the certification issue would be subject to judicial review was shared not only by Williams, but also by a representative of the Justice Department, Deputy Assistant Attorney General Robert Willmore, as is evidenced by the following exchange:

> Frank: Well, but the plaintiff can still contest the certification, could he not?
>
> Willmore: Yes.

See Arbour, 903 F.2d at 421. Later during the hearing, Willmore reiterated: "Chairman Frank is correct that a plaintiff can challenge that certification. So that would be reviewable by a court at some point, probably by a Federal District Court." We agree. The legislative history of the certification provision of the Reform Act coupled with the language of the statute itself persuades us that the Attorney General's scope certification is pertinent and dispositive only for removal purposes.

Our interpretation of the statute is supported by several additional considerations. First, separation of powers concerns. . . . As the First Circuit cogently noted, "it is hard to imagine Congress empowering an executive officer, the Attorney General of the United States, to displace the federal court as the final determiner of the scope of employment question, thus forcing a federal court to forego determination of its own jurisdiction, and

preventing the plaintiff, by executive fiat, from pursuing a possibly legitimate claim in state court." *Nasuti v. Scannell*, 906 F.2d 802, 812 (1st Cir. 1990).

Moreover, the statutory interpretation urged by defendant Lehtinen is particularly suspect because it leaves the determination of a dispositive issue in FTCA cases to an interested party. . . . We do not believe Congress intended to entrust the party responsible for providing the federal employee's defense with the power to make a scope determination that will have the result of dismissing the plaintiff's suit for lack of jurisdiction. *Nasuti*, 906 F.2d at 812-13. . . .

We are also cognizant of the due process implications inherent in treating the Attorney General's scope certification as dispositive. We share the First Circuit's observation that nothing in the regulations governing scope certifications requires the Attorney General "to conduct a neutral proceeding, open to all parties, before taking a final position on the scope question. . . . "

Finally, whether an employee's actions are within the scope of his employment for purposes of the Reform Act is an issue governed by the law of the state where the incident occurred. *Nasuti*, 906 F.2d at 805 n.3; *Arbour*, 903 F.2d at 421-22. Because this determination involves a question of law as well as fact, it is reasonable to assume that Congress entrusted the authoritative disposition of this question to the judicial rather than the executive branch.

Lehtinen, 913 F.2d at 1541-42 (some citations omitted) (emphasis added by *Lehtinen* court).

As I have indicated, six circuits in addition to the Eleventh, employing similar rationales, have reached the same conclusion. The First Circuit in *Nasuit* added:

> Even without that [legislative history of the Westfall Act], it is hard to imagine Congress empowering an executive officer, the Attorney General of the United States, to displace the federal court as the final determiner of the scope of employment question, thus forcing a federal court to forego determination of its own jurisdiction, and preventing the plaintiff, by executive fiat, from pursuing a possibly legitimate claim in state court. Especially is this unlikely given the Attorney General's interested relationship to the case. It is his responsibility to represent and protect the interests of the United States and of the defendant employee, *see* 28 U.S.C. § 2679(c). There is no suggestion that the Attorney General is to conduct a neutral proceeding, open to all parties. . . .

Nasuti v. Scannell, 906 F.2d 802, 812 (1st Cir. 1990).

In short, my view is that the unambiguous language of section 2679(d)(2) provides that certification is conclusive for purposes of removal, but reviewable for purposes of substitution. Even if the language were ambiguous, however, I would reach the same result. Congressional intent and legislative history, as explained previously by other circuits and reiterated here, make that conclusion inescapable.

C

As I understand part III of the majority opinion, it would, quite apart from the above analysis, create a

subset of cases (such as this one) concerning any high military officer "inquiring into a report to him concerning improper performance of duty." Slip op. at 8. Regardless of whether the executive or the judicial branch is the ultimate judge of the scope of employment question, holding Admiral Carter accountable would not, as the majority suggests, hamstring "one of the principal officers of the United States" in the performance of his duties. Slip op. at 13. Carter could be held liable only if he acted *outside of* the performance of his duties. Moreover, section 2679(d)(2) is not directed at preserving discipline in the military. It grants protection to *all* federal employees.[3] There is no difference in principle between applying the statute to the improper action of a four-star admiral and applying it to the improper action of a mid-level supervisor of postal employees.

The majority nonetheless expresses concern that permitting judicial review of this military officer's civil tort might somehow affect national security. They go to some length to point out that Admiral Carter could direct movements of the Atlantic Fleet from his garden while dressed in civilian clothes and be well within the scope of

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[3] "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments. . . .

> "Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty . . . , and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

28 U.S.C. § 2671.

his authority. They conclude that this case involves more than the mere construction of a federal statute and the Virginia law on scope of employment.

> It has to do with the ability and obligation of one of the principal officers of the United States to perform his duty unhampered by having to answer for the same in a civil court. No one can seriously contend that Admiral Carter would not have the authority to order the movement of ships and aircraft from the same garden involved here (which is owned by the government) at the Norfolk Naval Base at any hour of the day or night, on any day of the week. . . .

Slip op. at 13.

We all fervently hope, of course, that if this country were to fall under surprise nuclear attack or suffer an invasion or other military crisis, the Admiral and all of our other military servants would respond from whatever geographical and physical positions they occupied at the time. In my view, however, this hardly equates with the situation in which an officer, enjoying one of the highest honors and offices that our nation can bestow, uses the prerogatives of his position to vindicate a personal peeve – as the district court concluded. Even viewing the case in a purely military context, as does the majority, I agree that it involves more than merely the construction of federal and state laws. It should demonstrate our most basic principle – that, even recognizing the rare exceptions implicit in critical national emergencies, the law operates on all citizens equally.

D

The majority draws an analogy between the actions of high-ranking military officials and the conduct of judges entertaining petitions for relief while at home or in other nonjudicial locations. I have no quarrel with the thesis that both judicial officers and military officers at times must respond to emergencies while in locations other than their official stations. I think, however, that this analogy misses the mark by a wide margin. None of us would suggest that a judge could summon a litigant on the streets or in a social hall and administer judicially because of some personal whim or caprice. Nor should a judge be immune from liability for sexual harassment, whether it occurs on or off judicial premises, or for unduly chastising a parking lot attendant or custodial employee. There should be no question that a judicial officer would be denied immunity from suit over such nonjudicial derelictions.[4] For the same reasons, a military officer should be denied immunity from civil action by a civilian policeman who sues over tortious conduct by the officer, brought on by an allegation from the officer's wife that the policeman was rude. Although the treatment afforded Officer Johnson was considerably short of a flogging, it was unbecoming to an officer of Admiral Carter's high rank and, to say the least, was not in the Navy tradition of *noblesse oblige*.

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[4] Regrettably, the majority opinion shadows this principle with doubt, since the Westfall Act applies to judicial (and executive and legislative) employees as well as military employees. 28 U.S.C. § 2671.

E

It may be that an authoritative and elitist rule completely immunizing high-ranking military officials for any and all tortious conduct toward subordinates would create a better and more disciplined military. A more egalitarian approach to military discipline in a democratic country is at least equally tenable. Despite the temptation to engage in tangential, philosophical concerns, however, the legal issue we review is not about the military. Nor is it about libel, or whether Mrs. Carter or Officer Johnson is lying. The issue we review is about a federal law enacted to protect the efficiency of federal employees' performances.

Focused in this fashion, I view the implications of our decision in a perspective different from the majority's. Even aside from possible constitutional concerns, it is hard for me to fathom that Congress would grant the executive branch the authority to protect from liability under any and all circumstances officials, military or otherwise, who have violated our civil laws. I believe Congress intended that a principal officer of the United States, no matter how high his position, must, in fact, be "hampered" by having to answer for civil transgressions in civil court if he acts outside the scope of his authority, and that the jurisdiction to decide the ultimate question of authority rests with the judiciary.

II

Although review of the Attorney General's certification on substitution is necessary only if certification *is*

reviewable, the majority nonetheless engages in that analysis in part IV of its opinion. Like its holding on the reviewability question, I believe the majority's conclusion that Admiral Carter's actions fell within the scope of his employment is also faulty.

The district court held that Admiral Carter acted outside the scope of his military employment when the incident at issue occurred. The majority correctly notes that in FTCA cases the determination whether an employee's actions are within the scope of employment is to be made under the law of the state in which the tort occurred – in this case, Virginia. Contrary to the majority, however, I think application of Virginia law to the facts here requires affirmance of the district court's holding that Carter acted outside the scope of his employment. We, of course, consider *de novo* the district court's application of the Virginia law. Although the record presents us with significant factual disputes, we must affirm the district court's factual findings unless they are clearly erroneous.

Only three people witnessed the traffic encounter: Officer Johnson, the plaintiff; Carole Carter, the Admiral's wife; and Janeen Carter, the Admiral's daughter. The two women's story differed critically from Johnson's. Admiral Carter, perhaps understandably, chose the version offered by his wife and daughter without investigating or inquiring into the possibility that Johnson was correct. Mrs. Carter stated that her daughter was traveling 23 miles per hour; Johnson clocked her at 40 miles per

hour. Mrs. Carter said that Johnson was rude and discourteous; he stated that he was professional and courteous. They also differed in their accounts of the actual words that passed between them.

Relevant is the discrepancy between the view of Admiral Carter concerning his encounter with Johnson at his home and the version offered by independent witnesses. Carter testified in his deposition that he did not send for Johnson but merely for his superiors, and that he did not address Johnson initially but spoke to him only after he was identified. Major Maynard wrote that when he, Navy Lt. Irene Glass (the Naval Station command duty officer), and Johnson reported to Carter, the Admiral

> stated that the speeding . . . was really not his concern at that moment. He was really concerned about the way the officer treated his daughter. He then stated that when his daughter showed officer Johnson his placard with the stars on it, officer Johnson stated that those stars don't give you the right to speed or break any other laws on this base. He then continued by stating that when his wife came back and was getting out of her vehicle, officer Johnson yelled at her to get back in her vehicle. He then asked officer Johnson if that was not true? Officer Johnson said "no sir". Admiral Carter then called officer Johnson a liar. . . . He then stated that he had a lot of people working for him including Jimmy Pappas [the base commander], and that he way going to have the whole incident investigated.

Admiral Carter also insisted in his deposition that he was not really angry but only agitated, whereas Lt. Glass

testified that the Admiral told Major Maynard "he could have him fired, be replaced." She then testified that Carter did not ask Johnson if he had been rude to his wife or daughter (as the Admiral testified in deposition); rather, he told Johnson he had been rude: "I recall generally [Carter] telling [Johnson] that he was disrespectful, or rude to [Mrs. Carter]. He didn't ask him." Lt. Glass also testified that Admiral Carter told Johnson he was not doing his job and said, in effect, that Johnson had treated his wife and daughter like common criminals. Finally, she testified that Admiral Carter "appeared upset" and that she could tell this from "[t]he tenor of his voice, his posture. . . . He was using controlled anger."

In my view, these facts, which the district court interpreted by crediting Johnson's version, are critical to our review. To invoke Virginia's law of *respondeat superior*, the employee's act must be fairly and naturally incident to the employer's business, be done while the employee was engaged in the employer's business, and be done with a view to further the employer's interests. *Roughton Pontiac Corp. v. Alston*, 372 S.E.2d 147, 149 (Va. 1988); *United Bhd. of Carpenters v. Humphreys*, 127 S.E.2d 98, 102 (Va. 1962), *cert. denied*, 371 U.S. 954 (1963). Scope of employment is determined from the surrounding circumstances, including character of the employment, nature of the wrongful deed, time and place of its commission, and the purpose of the act. *See, e.g., Abernathy v. Romaczyk*, 117 S.E.2d 88, 92 (Va. 1960) (declaring scuffle an independent venture to gratify personal feelings); *Bryant v. Bare*, 64 S.E.2d 741, 747 (Va. 1951) (holding within scope an accident occurring when employee had, after earlier detour, proceeded

on highway as instructed); *Appalachian Power Co. v. Robertson*, 129 S.E. 224, 227-28 (Va. 1925) (holding outside scope a courtesy performed for third person during meal hour off work premises); *Drake v. Norfolk Steam Laundry Corp.*, 116 S.E. 668, 670 (Va. 1923) (holding within scope an employee's going out of way for own purposes on an errand that began and was to end in service of employer).

Carter cites naval regulations detailing the duties of naval commanders – in particular, the Commander-in-Chief of the United States Atlantic Fleet.[5] Specifically, Carter argues that general supervision of base security forces, including the supervision of motor vehicle traffic, is among his responsibilities.[6]

Johnson also relies on naval regulations to support his contrary contention – that Carter acted outside the scope of his employment. He particularly stresses Navy regulation 721.18, which prohibits a military officer from participating in any action that has the appearance of a conflict of interest.[7] Johnson also cites regulations that

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[5] 32 C.F.R. §§ 700.309(a), 700.602(a), 700.602(d).

[6] OPNAVINST 5530.14B at ¶ 5.c; *id.* 11200.5C at ¶¶ 1-4.b(1), 4.3.a(3). OPNAVINST is the code of instructions promulgated by the Chief of Naval Operations.

[7] 32 C.F.R. § 721.18(b)(4) and (d) provide that a naval officer must . . .

> (b) [a]void any action, whether or not specifically prohibited, which might result in or reasonably be expected to create the appearance of
>
> . . . .

prohibit tyrannical behavior and abusive language in dealings with subordinates,[8] and proscribe the use of insulting or defamatory language in general.[9] Johnson contends that when Carter violated these regulations, he did so "upon his own responsibility."[10]

In my view, consideration of the cited naval regulations alone presents a close question whether Carter's actions were incident to his employer's business. Assuming, however, that the regulations cited by Carter vested him with authority, and that it was not vitiated by the conflict-of-interest regulations, there remains the question under Virginia law whether he acted with the *purpose* of fulfilling these responsibilities as a naval commander, or for personal reasons. In this context, Carter argues that a mixed personal/official motive would show that his actions fell within the scope of his employment, pursuant

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(4) [l]osing complete independence or impartiality,

. . . .

(d) . . . not engage in any activity that might result in or reasonably be expected to create the appearance of a conflict of interest.

[8] Navy regulations, article 0814 provides:

Persons in authority are forbidden to injure their subordinates by tyrannical or capricious conduct, or by abusive language.

[9] Uniform Code of Military Justice art. 133(a) (codified at 10 U.S.C. § 933); *id.* art. 133(c)(3).

[10] 32 C.F.R. § 700.702(b) provides:

A commanding officer who departs from his orders or instructions, or takes official action which is not in accordance with such orders or instructions, does so upon his own responsibility. . . .

to a "dual purpose doctrine." Although Carter cites *Kensington Associates v. West*, 362 S.E.2d 900 (Va. 1987), for this proposition, *Kensington* does not create such a doctrine.

In *Kensington*, the Virginia Supreme Court found that conduct prohibited by an employer may be activity outside the scope of employment. *Id.* at 903-04. At issue was the act of a security guard, who, engaging in horseplay, accidentally shot a construction worker in the foot. The shooting occurred when the guard, standing outside the construction employees' recreation room, tried to remove a gun from his holster to scare and have "fun" with a different construction worker. The guard's employer had given him specific instruction not to "bother" the construction workers. The court found that neither the horseplay nor the resulting shooting was done in furtherance of the employer's interests. Rather, they occurred when the guard "empbarked upon an independent venture to satisfy his own personal desire to have 'fun' and 'play' around." *Id.* at 903; *see also Abernathy v. Romaczyk*, 117 S.E.2d 88, 92 (Va. 1960) (holding that employee's argument and scuffle with plaintiff were "an independent venture of his own, and the relation of master and servant was for the time suspended"). These cases hardly support the creation of a "dual purpose doctrine."

I would not, therefore, disturb the district court's finding that Admiral Carter acted outside the scope of his employment. The alleged incident occurred in Carter's garden where, dressed in casual civilian clothing, he was engaged in a quintessential civilian activity. The court correctly determined that the single traffic incident, even against a backdrop of general complaints, did not pose a

grave and immediate problem. Resolution of the issue could easily have been postponed until the next day – a normal working day, during which the Admiral could have determined the facts in his office under normal military procedure and perhaps could have done so dispassionately. It is significant to me, and apparently was also to the district court, that Carter had received previous complaints about the discourtesy of the base's security officers but waited until the Sunday incident involving his wife and daughter to take action. These circumstances suggest personal and familial concerns, not a concern for furthering the military's interests.

III

In sum, I believe the district court acted according to statutory jurisdiction when it reviewed the Attorney General's certification for purposes of substitution, and it correctly determined that Admiral Carter acted outside the scope of his authority.

It is important to remember that we are not faced with the question whether the commission of a tort can be within the scope of employment. *Wallen v. Domm*, 700 F.2d 124, 126 (4th Cir. 1983) (per curiam), answered that question in the affirmative. We are faced, rather, with the question whether the commission of a tort by a government employee is always within the scope of employment when the Attorney General certifies that it is. I believe it is not, and therefore dissent.

I am authorized to state that Chief Judge Ervin, and Judges Phillips and Murnaghan join in this dissent.

Filed: March 3, 1993

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-3077
(CA-89-784-N)

William D. Johnson,

Plaintiff-Appellee,

versus

Powell F. Carter,

Defendant-Appellant.

ORDER

The Court amends its opinion filed January 15, 1993, as follows:

On page 9, first paragraph, line 4 after indented quotation – the phrase "the dining car of a train" is corrected to read *"a railroad restaurant for* a train."

For the Court – By Direction

/s/ Bert M. Montague
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-3077

WILLIAM D. JOHNSON,

Plaintiff-Appellee,

versus

POWELL F. CARTER,

Defendant-Appellant,

UNITED STATES OF AMERICA,

Appellant.

ORDER

(Filed OCT 09 1991)

Upon a request for a poll of the court, a majority of the judges in regular active service voted to rehear this case en banc.

It is accordingly ORDERED that the opinion of the panel, decided the eighth day of July, 1991, 939 F.2d 180, shall be, and it hereby is, vacated.

It is FURTHER ORDERED that the clerk will see that the case is placed on the en banc calendar in the regular course of business.

/s/
H. E. Widener, Jr.
U. S. Circuit Judge

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIAM D. JOHNSON, *Plaintiff-Appellee,* v. POWELL F. CARTER, Defendant-Appellant, UNITED STATES OF AMERICA, *Appellant.*	No. 90-3077

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk.

John A. MacKenzie, Senior United States District Judge. (CA-89-784-N)

Argued: October 3, 1990

Decided: July 8, 1991

Before WIDENER and SPROUSE, Circuit Judges, and NICKERSON, United States District Judge for the District of Maryland, sitting by designation.

Affirmed by published opinion. Judge Sprouse wrote the majority opinion, in which Nickerson joined. Judge Widener wrote a dissenting opinion.

COUNSEL

ARGUED: Patricia M. Bryan, Deputy Assistant Attorney General, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington D.C., for Appellants. Jeremiah A. Denton, III, Virginia Beach, Virginia, for Appellee. **ON BRIEF:** Stuart M. Gerson, Assistant Attorney General, Barbara L. Herwig, Michael E. Robinson, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Henry E. Hudson, United States Attorney, Norfolk, Virginia; Richard F. Walsh, OFFICE OF THE JUDGE ADVOCATE GENERAL OF THE NAVY, Alexandria, Virginia for Appellants.

OPINION

SPROUSE, Circuit Judge:

We consider whether the United States must be substituted as the sole defendant in a suit against a United States military officer for alleged tortious conduct. Involved is an interpretation of the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the Westfall Act). We also consider whether the officer has military immunity under the doctrine announced in *Feres v. United States*, 340 U.S. 135 (1950), and whether the suit should have been brought under the Civil Service Reform Act of 1978, Pub.L. 95-454, 92 Stat. 1111 *et seq.*

William D. Johnson, a civilian law enforcement officer stationed at the Norfolk Naval Base in Virginia, sued Admiral Powell F. Carter, Jr., Commander-in-Chief of the United States Atlantic Fleet, in state court for claims

arising out of an incident in which Carter allegedly called Johnson "a liar." Johnson sought damages for slander, libel, insulting words, intentional infliction of emotional distress, and tortious interference with contractual and business relations. After removing the case to federal district court, pursuant to 28 U.S.C. §§ 1442, 1442a, and 2679(d)(2), Carter moved to substitute the United States as sole defendant, pursuant to the Westfall Act which requires that suits against Federal employees for actions committed within the scope of their office or employment be brought only under the Federal Tort Claims Act.[1] Alternatively, Carter moved to dismiss the case on grounds of intramilitary immunity under *Feres*. The district court denied these motions. However, it granted a stay of further proceedings pending this appeal We affirm.

I.

Carter is the Commander-in-Chief of the U.S. Atlantic Fleet, which has its shore installation at the Norfolk Naval Base in Virginia. On Sunday, the 18th day of June, 1989, Johnson, a civilian law enforcement officer of the Naval Base Security Force, stopped Janeen Carter, Admiral Carter's daughter, for speeding and issued her a warning. Travelling in a separate car, Carter's wife witnessed the incident and provided the vehicle number of Johnson's patrol car when she related the incident to her

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[1] Johnson's actions for libel and slander, however, could not have been brought under the FTCA because actions of this type are excluded under the Act. 28 U.S.C. § 2680(h).

husband. She, along with Janeen, alleged that Johnson was "rude and intimidating" during the stop.

Carter, who had received similar complaints about discourteous conduct on the part of base patrolmen, concluded that the patrolman had been abusive and "requested" two of Johnson's superiors to bring him to Carter's quarters.[2] On that same Sunday afternoon, two of Johnson's superiors escorted Johnson to the garden of Carter's place of residence where the latter was tending his garden dressed in casual civilian clothes. Carter contends that he directed most of his comments to the duty officer or the supervisor, remarking on the persistent problem of discourtesy by base police and the need to correct the problem. In any event, in reply to Carter's inquiry, Johnson denied he had engaged in rude conduct directed at Carter's wife and daughter. In his deposition, Carter stated that he "believes" he responded "I think your are lying." However, Johnson in his affidavit averred that Carter, in response to his denial, said, "You are a liar."

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[2] Carter indicated in his formal statement in the district court that he only instructed that a duty officer and a supervisor from the Naval Base Security Force report to his quarters so that he could identify the patrolman in question. According to Carter, he only wanted to learn the person's identity so that he could file a complaint against that patrolman. The two officers that arrived with Johnson both indicated, however, one in her deposition testimony and the other in a contemporaneously written memorandum to the chief of police, that Carter requested that Johnson be brought to his residence. The district court as indicated in its order granting the stay resolved this in favor of Johnson – finding that Johnson was escorted to Carter's residence on that latter's instruction.

The next day, Carter formally complained[3] about Johnson's conduct and a local newspaper reported the incident. Following an investigation, civilian authorities of the Naval Base Security Force recommended and approved a two-day suspension for Johnson. An arbitration panel later reduced the suspension to a letter warning.

The district court found "incredible" the U.S. Attorney's certification that Carter was acting within the scope of his employment. In its order denying the motion for reconsideration, the district court set forth in writing its reasons for denying the government's motion to substitute or to dismiss. In distinguishing *Wallen v. Domm*, 700 F.2d 124 (4th Cir. 1983), which involved a charge of assault against the plaintiff's supervisor, the district court noted that there the discussion that formed the basis for the charge took place on a normal work day in the defendant's office, that the defendant was the immediate supervisor of the plaintiff and that the substance of the discussion was entirely work-related. In contrast, the district court noted that the incident in the case *sub judice* occurred on a Sunday while the Admiral was at home gardening in civilian clothing, that Carter is not the base commander, and that the essence of the conversation concerned the altercation between Carter's daughter and Johnson as opposed to problems of base security. Finally, the court questioned whether such immediate action

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[3] In his statement supporting the motion to substitute, Carter said that he called Base Commander Admiral Pappas at his office the morning after the incident, reported the incident to him, and requested that normal investigative procedures be employed.

would have been taken if a civilian's daughter had been stopped by Johnson.

On appeal, Carter challenges the district court's refusal to substitute the United States as defendant, its refusal to dismiss the case under the *Feres* doctrine, and contends that the Civil Service Reform Act (CSRA) preempts state common law remedies for employment related action like that of the appellee's. We consider his contentions in that order.

II. Westfall Act

Carter argues that the United States should have been substituted as sole defendant in the action pursuant to 28 U.S.C. § 2679(d)(1) (the Westfall Act).[4] In denying

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[4] The Westfall Act provides in relevant part:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provision of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(1).

The Westfall Act is Congress' response to the Supreme Court's decision in *Westfall v. Erwin*, 484 U.S. 292, 108 S. Ct. 580, 98 L.Ed.2d 619 (1988), which limited a federal official's absolute immunity from tort claims to situations where the official's action was "within the outer perimeter of an official's duties *and* is discretionary in nature." *Id.* at 300 (emphasis added). Congress viewed this as an erosion of the common law tort immunity formerly available to federal employees. *See Arbour v.*

Carter's motion to substitute the United States, the district court rejected the United States Attorney's certification that Carter was acting within the scope of his employment.[5] Carter argues that the district court erred in reaching a conclusion contrary to the attorney general's certification. Johnson, of course, argues in support of the district court's finding that Carter was not acting within the scope of his office or employment when he called him a liar. He stresses that Carter was acting in violation of naval regulations, without authority, and out of personal motivation.

Determination of whether an employee's actions are within the scope of employment for purposes of the Act involves a question of law as well as fact. *See S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1542 (11th Cir. 1990). However, where the facts are not in dispute, the "determination of the scope of employment is a question of law, reviewable *de novo.*" Washington v. United States, 868 F.2d 332, 334 (9th Cir.), *cert. denied*, 110 S. Ct. 539, (1989).

Jenkins, 903 F.2d 416, 420 (6th Cir. 1990). Congress restored the absolute immunity of government employees for acts within the scope of their employment providing that the Federal Tort Claims Act (FTCA) is the sole avenue for suits arising therefrom.

[5] Carter concedes that certification by a United States Attorney is subject to review for substitution purposes. 28 U.S.C. § 2679(d)(1). As our sister circuit observed in *Nasuti v. Scannell*, 906 F.2d 802, 812 (1st Cir. 1990), while section 2679(d)(2) provides that the prior certification "shall conclusively establish scope of office or employment *for purposes of removal*" (emphasis in original) section (d)(1) does not. *See also Arbour*, 903 F.2d at 421.

As here however, where some facts are in dispute,[6] the standard of review as to those factual findings is whether they are clearly erroneous. *See McCluggage v. United States,* 392 F.2d 395, 397 (6th Cir. 1968) (applying clearly erroneous standard to finding of fact on the issue of scope of employment in FTCA case).

Whether an employee's actions fall within the scope of his employment pursuant to the Westfall Act and FTCA is to be determined according to the rules of *respondeat superior* of the state in which the wrongful conduct occurred. *Nasuti,* 906 at 805 n.3; *Arbour,* 903 F.2d at 421-22; H.R. Rep. 100-700, 100th Cong., 2d Session 5, *reprinted in* 1988 U.S. Code Cong. & Admin. News at 5949; *citing Williams v. United States,* 350 U.S. 857 (1955).

The test in Virginia is whether the act was fairly and naturally incident to the employer's business, was done while the employee was engaged upon the employer's business, and was done with a view to further the employer's interests. *Roughton Pontiac Corp. v. Alston,* 236 Va. 152, 372 S.E.2d 147 (1988), *see also United Brotherhood v. Humphreys,* 203 Va. 781, 127 S.E.2d 98, 102 (1962), *cert. denied,* 371 U.S. 954 (1963); *McNeill v. Spindler,* 191 Va. 685, 62 S.E.2d 13, 17 (1950); *Manuel v. Cassada,* 190 Va. 906, 59 S.E.2d 47, 50 (1950). Scope of employment is determined from the surrounding circumstances, including character of the employment, nature of the wrongful deed, time and place of its commission as well as the purpose of the act. *See, e.g., Abernathy v. Romaczyk,* 202 Va. 328, 117 S.E.2d 88, 92 (1960) (scuffle held independent venture to gratify

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[6] *See* note 1, *supra.*

personal feelings); *Bryant v. Bare*, 192 Va. 238, 64 S.E.2d 741, 747 (1951) (accident occurring when employee had, after earlier detour, proceeded on highway as instructed held within scope); *Appalachian Power Co. v. Robertson*, 142 Va. 454 129 S.E. 224, 227-28 (1925) (courtesy performed for third person during meal hour off of work premises held not within scope); *Drake v. Norfolk Steam Laundry Corp.*, 135 Va. 354, 116 S.E. 668, 670 (1923) (going out of way for own purposes on an errand that began and was to end in service of employer held within scope).

Carter cites naval regulations detailing the duties of naval commanders and the Commander-in-Chief of the U.S. Atlantic Fleet specifically. He points out, among other things, that he is "responsible for the administration, training, maintenance, support and readiness of the Atlantic Fleet including those forces temporarily assigned to the operational command of other commanders,"[7] that he may "exercise authority through his immediate subordinate commanders [or] he may communicate directly with any of his subordinates," and that he holds the same relationship to shore activity of his command in which his headquarters are located – here, the Norfolk Naval Base. Specifically, Carter argues that general supervision of base security forces is among his responsibilities.[8]

Johnson also relies on naval regulations to support his contrary contention – that Carter was acting outside the scope of his employment. He particularly stresses Navy Regulation 721.18 to the effect that a military officer

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[7] 32 C.F.R. § 700.309.

[8] OPNAVINST 5530.14b ¶ 5.

may not participate in any action which has the appearance of a conflict of interest.[9] Johnson also notes regulations that prohibit tyrannical behavior and abusive language in dealings with subordinates[10] as well as well as proscribe the use of insulting or defamatory language in general.[11] Johnson contends that pursuant to Article 0702 of the Navy regulations, when Carter violated these regulations, he did so "upon his own responsibility."[12]

In our view, consideration of the cited naval regulations alone presents a close question of whether Carter

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[9] 32 C.F.R. § 721.18(b)(4) and (d) provide that a naval officer must . . .

> (b) Avoid any action, whether or not specifically prohibited, which might result in or reasonably be expected to create the appearance of:
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> * * *
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> (4) Losing complete independence or impartiality.
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> (d) . . . not engage in any activity that might result in or reasonably be expected to create the appearance of a conflict of interest.

[10] Navy Regulation 0814 provides:

> Persons in authority are forbidden to injure their subordinates by tyrannical or capricious conduct or by abusive language.

[11] *See* 10 U.S.C. § 933.

[12] 32 C.F.R. § 700.702(h) provides:

> A commanding officer who departs from his orders or instructions, or takes official action which is not in accordance with such orders or instructions, does so upon his own responsibility. . . .

was acting within the scope of his employment. Assuming, however, that the regulations cited by Carter vested him with military authority, and that the authority was not vitiated by the conflict-of-interest regulations, there remains the question under Virginia law whether he was acting with the *purpose* of fulfilling these responsibilities as a naval commander or for personal reasons. In this context, Carter argues that a mixed personal/official motive would suffice to support his actions as coming within the scope of his employment pursuant to a "dual purpose doctrine," citing *Kensington Assoc. v. West*, 362 S.E.2d 900 (1987). In *Kensington*, the Virginia Supreme Court of Appeals found that conduct which is prohibited by the employer may be activity not considered to be within the scope of employment. *Kensington* involved a security guard shooting the plaintiff construction worker in the foot when the former was attempting to remove a gun from his holster in the construction employee recreation room. The court there found that the employer had given the employee specific instruction not to "bother" the construction workers. The court found that neither the horseplay nor the resulting shooting were done in furtherance of the employer's interests. Rather, they "arose wholly from an independent, external, and personal motive on [the employee's] part to perform an act upon his own account. . . . [H]e embarked upon an independent venture to satisfy his own personal desire to have 'fun' and 'play.' " *Id.* at 903.

Likewise, in *Abernathy v. Romaczyk*, 202 Va. 328, 117 S.E.2d 88, 92-93 (1960), the court held that the employee's engagement in an argument and subsequent scuffle with the plaintiff after a traffic accident was "an independent

venture of his own to gratify his personal feelings, and the relation of master and servant was for a time suspended." The language in neither *Kensington* nor *Abernathy* establishes a rule which would equate authority to perform an act with acting *pursuant* to that authority for purposes of finding that an employee acted within the scope of employment.

In sum, we are not inclined to disturb the district court's finding that Carter was not acting within the scope of his employment. The alleged incident occurred in Carter's garden where, dressed in casual civilian clothing, he was engaged in a quintessential civilian activity. The court could have understandably determined that the single traffic incident, even against a background of general complaints, did not pose such a grave and immediate problem and that its resolution could have been postponed until the next day – a normal working day where the admiral could have determined the facts concerning the incident in his base office under normal military procedure. It was apparently significant to the district court that, from Carter's own admissions, he had received previous complaints about the discourteousness of the base's security officers, but that it was not until the incident involving his wife and daughter that he decided to take action, and then on a Sunday under circumstances suggesting a familial concern. If Carter's allegedly tortious conduct had occurred in a meeting in his office during the work week and was conducted pursuant to regulations, there is no question but he would have been acting within the scope of his authority. Any tort he may have committed under those circumstances would have been sheltered by absolute

immunity. *Wallen v. Domm*, 700 F.2d 124 (4th Cir. 1983). Here, unlike *Wallen*, however, we are not faced with the question of whether the commission of a tort can be within the scope of employment. *Wallen* answered that question in the affirmative. *Id.* at 126. The question here is whether Carter's participation in the incident fell in any way within the scope of his employment. We think that the district court correctly interpreted the law and that its factfinding that Carter's intent was not to further the military's interest and that he was not acting within the scope of his duties is supported by the record and, thus, not clearly erroneous. The putative merit of Johnson's substantive complaints is another question. We only decide that those questions must be determined by a state court.

III. *Feres* Doctrine

Neither do we agree that the Feres doctrine bars Johnson's suit. The principles of intramilitary immunity were set forth in *Feres v. United States*, 340 U.S. 135, 146 (1940), for injuries that "arise out of or are in the course of activity incident to service." The rule is based on "[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain . . . " *United States v. Brown*, 348 U.S. 110, 112 (1954), and reflects the notion that courts should not interfere with the management of the military or "call[] into question basic choices about the discipline, supervision, and control of a serviceman." *United States v. Shearer*, 473 U.S. 52, 58 (1985).

The *Feres* doctrine may bar a claim by a civilian plaintiff if the incident brings into question command or personnel decisions by military officers. *McGowan v. Scoggins*, 890 F.2d 128, 138 (9th Cir. 1989). In *McGowan*, a college professor who had received a medical discharge from the armed forces many years earlier was detained and allegedly assaulted by military police officers while on base obtaining a parking sticker. In finding that the *Feres* doctrine did not bar McGowan's suit, the Ninth circuit found it significant that the professor was not employed at the base nor was his work elsewhere subject to military supervision, command or discipline.

In the case we consider, Johnson was employed at the military base, but Carter admitted in his deposition that he never directly supervised any patrol officer as an immediate subordinate and that the meeting he called with the officer was not for the purpose of discipline. He also conceded that reprimanding Johnson through formal disciplinary action was beyond his authority. Admiral Carter is not the commanding officer of the base, and, as he stated in his deposition, he does not have the "ability to officially exert punitive action like to suspend somebody, to reduce their pay, to fire them. . . . " Thus the case *sub judice* does not implicate the concern for maintenance of disciplinary control over subordinates protected by the *Feres* doctrine.

IV. The Civil Service Reform Act

Carter finally contends that even if the *Feres* doctrine does not bar Johnson's claims, the latter should be relegated to remedies under the Civil Service Reform Act.

Bush v. Lucas, 462 U.S. 367 (1983). The CSRA is applicable only to personnel actions involving one of the enumerated prohibited personnel practices: an appointment, promotion, disciplinary or corrective action, a detail, transfer or reassignment, a reinstatement, a restoration, a reemployment, a performance evaluation, a decision concerning pay benefits or awards, or any other significant change in duties or responsibilities. 5 U.S.C. § 2302(a)(2)(A).

Johnson's suit does not arise out of disciplinary or corrective action as Carter contends. Carter admitted he did not intend to discipline Johnson but rather to file a formal complaint, on a personal level. Further, the disciplinary action that was ultimately taken against Johnson is not the basis of this suit. *See, e.g., Pinar v. Dole*, 747 F.2d 899 (4th Cir. 1984) (federal employee action contesting termination of temporary promotion and subsequent suspension), *cert. denied*, 471 U.S. 1016 (1985).

CONCLUSION

For all the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

I would hold that the Attorney General's certification that Admiral Carter was acting within the scope of his employment precludes consideration of that issue by the

courts. In addition, even if consideration is not precluded, I would hold that the district court did not give proper weight in making its factual findings either to the Virginia presumption in favor of finding acts of an agent to be within the scope of employment, or the Navy Regulation putting Admiral Carter on duty "at all times." Therefore, I would hold those findings to be clearly erroneous.

I

By the plain language of 28 U.S.C. § 2679(d)(2), no discretion is given to the district court. If the Attorney General certifies that the defendant employee was acting within the scope of his employment, "the United States *shall* be substituted as the party defendant." 28 U.S.C. § 2679(d)(2).

The courts of appeal are split regarding this issue. The First, Third, Sixth, and Eleventh Circuits follow the course taken by the district court and do not defer to the Attorney General's determination.[1] See *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538 (11th Cir. 1990); *Melo v. Hafer*, 912 F.2d 628 (3d Cir. 1990), *cert. granted*, apparently

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[1] These courts believe there would be potential separation of powers problems if the Attorney General's scope certification was given conclusive effect. I do not agree.

We recently held that, in ordinary circumstances, a reduction in sentence for assisting the government can only occur upon motion of the government as stated in the sentencing guidelines. *United States v. Francois*, 889 F.2d 1341 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 1822 (1990). We found no separation of powers problem with vesting absolute discretion in the prosecutor in deciding whether to file a motion or not.

on other grounds, 59 U.S.L.W. 408 (Feb. 25, 1991); *Nasuti v. Scannell*, 906 F.2d 802 (1st Cir. 1990); *Arbour v. Jenkins*, 903 F.2d 416 (6th Cir. 1990). The Fifth and Tenth Circuits follow Congress' express language and give conclusive effect to the Attorney General's certification. See *Mitchell v. Carlson*, 896 F.2d 128 (5th Cir. 1990); *Aviles v. Lutz*, 887 F.2d 1046 (10th Cir. 1989).[2] In my opinion, a sufficient reason for reversal is the district court's failure to give conclusive effect to the Attorney General's certification of scope of office or employment.[3]

II

Even if the district court had the authority to disregard the Attorney General's certification of scope of office or employment, I conclude that its factual finding that Admiral Carter's actions were outside the scope of employment was clearly erroneous.

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[2] The Ninth Circuit held that § 2679(d) did not apply if to do so would deprive the plaintiff of his remedy against the government. *Smith v. Marshall*, 885 F.2d 650 (9th Cir. 1989). But the Supreme Court rejected the Ninth Circuit approach and reversed *sub nom. United States v. Smith*, 59 U.S.L.W. 4201 (1991). The Court held that "Congress recognized that the required substitution of the United States as the defendant in tort suits filed against Government employees would sometimes foreclose a tort plaintiff's recovery altogether." 59 U.S.L.W. at 4203.

[3] The majority states that the government conceded that certification by a United States Attorney is subject to review for substitution purposes. While the government's position is unnecessarily ambivalent, it should be relieved of a concession improvidently made. See *Denney v. Seaboard Lacquer, Inc.*, 487 F.2d 483, 492 (4th Cir. 1973).

As the majority correctly states, Virginia's rules of *respondeat superior* govern the determination of whether Admiral Carter was acting within the scope of his employment. Slip op. at 7-8. In Virginia, once the employment relationship has been established (and it is conceded here), the party opposing a finding of *respondeat superior* has the burden of proving the employee was outside of the scope of employment when the incident occurred. See, e.g., *Slaughter v. Valleydale Packers, Inc.*, 198 Va. 339, 343-44, 94 S.E.2d 260, 263-64 (1956); *Alvey v. Butchkavitz*, 196 Va. 447, 453, 84 S.E.2d. 535, 539 (1954) ("We have repeatedly held that where the relationship of master and servant has been established the burden is on the master to prove that the servant was not acting within the scope of his employment when he committed the act complained of. . . .)"; *Crowell v. Duncan*, 145 Va. 489, 501, 134 S.E. 576, 579 (1926) ("Where it is doubtful whether a servant in injuring a third person was acting within the scope of his authority, the doubt will be resolved against the master. . . . "). Admiral Carter established that he was employed by the United States. Therefore, the burden was on Johnson to prove that Admiral Carter's actions were outside of the scope of employment. The district court thus erred in not applying the Virginia presumption to this case.

In Virginia an act is deemed to be within the scope of employment if:

> (1) it was expressly or impliedly directed by the employer, or is naturally incident to the business, and
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> (2) it was performed, although mistakenly or ill-advisedly, with the intent to further the

> employers interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employer's business, "and did not arise wholly from some external, independent, and personal motive on the part of the [employee] to do the act upon his own account."

Kensington Assoc. v. West, 234 Va. 430, 432, 362 S.E.2d 900, 901 (1987) (citations omitted).

It cannot be said from anything in this record that Admiral Carter's summoning of a base police officer arose "wholly from some external, independent, and personal motive" on his part. Undisputed contemporaneous written records corroborate that Admiral Carter had previously and consistently expressed his displeasure with the conduct of the base police, and that he took action to remedy the situation. Upon taking command of the Atlantic Fleet, Admiral Carter became aware of problems with the quality of life of naval personnel on the bases around Norfolk and attempted to improve the situation. The conduct of the base police had been a concern of his for quite some time. As early as November 16, 1988, he expressed his concerns to Rear-Admiral Pappas about reports he had heard concerning rude conduct by base police. He expressed those concerns on numerous occasions. On November 22, 1988, Admiral Carter noted that Rear Admiral Pappas "[t]old me results [of] looking into discourtesy. . . . Stories on police hard to pin down. Not many H.L. complaints. People may feel its their word against police so its no use." On February 2, 1989, Carter noted that he had told Pappas that "MG Doran USAF is *another* who has had probs w/ police discourtesy to his guests on base. Realize *many* of police are great, but

evidence is there are a few out of line. Need identify + correct." Carter's notes indicate an increasing level of frustration with the inability to correct the problems of police rudeness because of difficulties in identifying the personnel who were causing the problems. Therefore, it is not surprising that he took direct and immediate action when his wife was able to identify a policeman who had acted rudely.

Both the majority and the district court gave controlling weight to the fact that the "incident occurred in Admiral Carter's garden where, dressed in casual civilian clothing, he was engaged in a quintessential civilian activity." Slip op. at 10. The majority decision even admits that if the incident had occurred in Admiral Carter's office "during the work week" and was conducted pursuant to regulations, "there is no question but he would have been acting within the scope of his authority." Slip op. at 10. Where and when Admiral Carter exercises his authority is of no moment, however. By Navy Regulations, Admiral Carter, while on active service, is "at all times subject to naval authority" and "may . . . exercise authority over all persons who are subordinate to [him]." 32 C.F.R. § 700.811(a) (1990). Therefore, Admiral Carter had the authority to summon a base police officer at any time. If he so chose, Admiral Carter could direct movements of the Atlantic Fleet from his garden, dressed in civilian clothing. His attire and location do not determine whether his acts were within the scope of his authority. He patently had the authority to summon Johnson to his home and he exercised that authority.

The allegedly tortious incident can not be looked at in isolation from the context in which it occurred. As we stated in *Wallen v. Domm*, 700 F.2d 124, 126 (4th Cir. 1983), a pre-Westfall Act common law immunity case:

> Few government officials are authorized to commit torts as a part of their line of duty, but to separate the activity that constitutes the wrong from its surrounding context – an otherwise proper exercise of authority – would effectively emasculate the immunity defense. Once the wrongful acts are excluded from an exercise of authority, only innocuous activity remains to which immunity would be available. Thus, the defense would apply only to conduct for which it is not needed.

We also made clear that "[a]pplication of the immunity is not affected by whether the injury was committed in good faith, negligently, or even intentionally." *Wallen v. Domm*, 700 F.2d 124, 126 (4th Cir. 1983).

The district court "found it incredible that the United States Attorney could make an affidavit that the words of the Admiral that the policeman who had stopped the Admiral's daughter for speeding was 'a liar,' were words spoken while the Admiral was acting within the scope of his employment as an employee of the United States." But the district court improperly looked at the words spoken in isolation from the surrounding acts. The question is, was the underlying conversation between Johnson and Admiral Carter "an otherwise proper exercise of authority" by Admiral Carter, not, as the majority holds, whether Admiral Carter spoke improperly during the conversation.

In *Barr v. Matteo*, 360 U.S. 564 (1959), the Supreme Court stated it is "the relation of the act complained of to 'matters committed by law to his control or supervision' – which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from suit." 360 U.S. 564, 573-74 (1959) (citation omitted). Control of the base policies was a matter committed by law to Admiral Carter's control or supervision, therefore, in my opinion, his activities were within the scope of his employment.

I should also add that I think the district court erred in holding that "to substitute the United States as the sole defendant, and to then dismiss the plaintiff's claims . . . [would] completely ignore any semblence of constitutional 'due process' to the plaintiff on his claim of alleged slander and libel." The Supreme Court, in *United States v. Smith*, 59 U.S.L.W. 4201 (1991), while it did not phrase its reasoning in constitutional terms, expressly rejected recovery on that very account and held that government employees are immunized from suit "even when an FTCA exception precludes recovery against the Government." 59 U.S.L.W. at 4203.

III

The fact that I have not addressed at any length the *Feres* doctrine or the Civil Service Reform Act should not indicate that I agree with either part of the majority decision with respect to those theories, for I do not.

Briefly, I think the *Feres* doctrine should apply for the reasons stated in *United States v. Shearer*, 473 U.S. 52, 59 (1985), in construing *Feres*, for I think the claim here is

" . . . the *type* of claim[] that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." (italics in original). I further agree with Judge Murnaghan's language in his concurrence in *Thigpen v. United States*, 800 F.2d 393, 403 (4th Cir. 1986) where he states that "[a]fter *Shearer*, then, the *Feres* doctrine must mean that no waiver of sovereign immunity may be found with respect to any claim, whether brought by a serviceman or a civilian, that challenges a military 'decision of command' relating to the effective management of military personnel and resources." With respect to the Civil Service Reform Act, that Act was not mentioned until appeal and should not be considered by us. *McGowan v. Gillenwater*, 429 F.2d 586 (4th Cir. 1970).

As I have indicated above, however, I am of opinion that we should not reach either the *Feres* doctrine or the Civil Service Reform Act, for Admiral Carter should not be subjected to a claim for liability in a civil court in this case because of the provisions of the Westfall Act.

IV

This case involves much more than merely the construction of the federal statute and the Virginia law on scope of employment. It has to do with the ability and obligation of one of the principal officers of the United States to perform his duty unhampered by having to answer for the same in a civil court. No one can seriously contend that Admiral Carter would not have the authority to order the movement of ships and aircraft from the

same garden involved here (which is owned by the government) on N.O.B. Norfolk at any hour of the day or night, for, pursuant to Navy Regulations "while on active service" he might "exercise authority over all persons who are subordinate" to him. It is just as true, and even the majority admits, that Admiral Carter had authority over the base policeman of N.O.B. Norfolk who is involved in this case. Since Admiral Carter had authority to control the base policeman in the performance of his (Admiral Carter's) duty, then he had the authority to perform that duty other than in a manner entirely in accord with public sensibilities (even if the words charged were uttered, which is admitted for argument).

The manner in which Admiral Carter performed his duty should not be subject to review by a civil court under the Westfall Act upon proper certification, as here, and that is what the Westfall Act is all about. I am of opinion that it should be, and it is, entirely within the province of Congress to provide, as it has, that the employment of certain officers and servants of the United States, such as Admiral Carter, is of such importance to the nation that their acts within the scope of their office or employment are shielded from liability unless Congress has specifically provided otherwise. I am further of opinion that it is entirely within the province of Congress to provide that the certification of the Attorney General conclusively establishes not only the scope of office or employment for the purposes of removal but also conclusive establishes that "[u]pon certification" "[s]uch action" "shall be deemed to be an action . . . brought against the United States . . . [which] shall be substituted as the party defendant." 28 U.S.C. § 2679(d)(2). And I also would

construe literally and within the authority of Congress the provisions of § 2679(b)(1) that "[a]ny other civil action or proceeding [except under §§ 1346(b) and 2672] for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred."

An analogy close to home will serve to make my point. 28 U.S.C. § 452 provides that the courts of the United States will always be in session. And there is not a one of us who has not in practice applied for and received injunctive or other like extraordinary relief from a judge, state or federal, at his home, and not on the bench or in his office. And the hour of the day or night does not make any difference, nor do Saturdays, Sundays, or holidays, as we all know. Why a judge, when at home, can issue an order of unquestionable validity, but Admiral Carter should be forbidden to take precisely the same action as an officer of the executive rather than the judicial branch, is not reasonably explainable, I think.

The Court, indeed, has discussed the principle at issue here in the course of its opinion in the famous case of *Cunningham v. Neagle*, 135 U.S. 55 (1890) at page 56:

> Important cases are often argued before the judge at any place convenient to the parties concerned, and a decision of the judge is arrived at by investigations made in his own room, wherever he may be, and it is idle to say that this is not as much the performance of judicial duty as the filing of the judgment of the clerk, and the announcement of the result in open court.

In *Cunningham*, the Court, without benefit of a statute, discharged from state custody the deputy marshal who was held on a state murder charge for killing an assailant apparently bent upon taking the life of Mr. Justice Field. The incident took place in the dining car of a train between Los Angeles and San Francisco while Mr. Justice Field was going from one place of holding court to another. But since, in the words of the Court, important cases may be decided in a judge's "own room" wherever he may be and this, "in the performance of judicial duty", I think "it is idle" to suggest that Admiral Carter's reprimand of the base policeman, which the majority admits would have been valid if administered in Admiral Carter's office, and pursuant to regulation, was invalid merely because it was administered in the Admiral's garden on the base at N.O.B. Norfolk. Any such decision can only serve to hamstring one of the principal officers of the United States in the performance of his duty.

Filed: August 20, 1991

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 90-3077
(CA-89-784-N)

William D. Johnson,

Plaintiff-Appellee,

versus

Powell F. Carter,

Defendant-Appellant

ORDER

The Court amends its opinion filed July 8, 1991, as follows:

On page 4, third full paragraph, line 5 – the " 's" on the word "appellee" is deleted.

On page 8, first full paragraph, line 12 – the name "Virginia Supreme Court of Appeals" is corrected to read "Virginia Supreme Court."

On page 10, first paragraph, lines 1 and 2 – the last sentence is corrected to read "We only decide that those questions must be determined *on remand.*"

On page 14, first full paragraph, line 2 of part (2) of the indented quotation – the word "employers" is corrected to read "employer's."

On page 15, first full paragraph, lines 4 and 8 – the cross-references are corrected to read "Slip op. at 9."

For the Court – By Direction

/s/ John M. Greacen
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

WILLIAM D. JOHNSON, Plaintiff,	]	
v.	]	CIVIL ACTION NO. 89-784-N
POWELL J. CARTER Defendant.	]	

ORDER

This matter is before the Court on the *United States'* motion to stay this action pending an appeal by the United States of this court's order dated April 10, 1990, denying the right of the United States to be substituted as the sole defendant in this suit, in lieu of defendant Carter.

We do not believe that the United States has a right of appeal in the case at bar, to which it is not a party, nor is the order of such finality as to permit the defendant, Carter, to appeal. However, in the interest of moving the matter along, no objection to the appeal being raised by the plaintiff, we reluctantly agree to a stay of further proceedings in this court pending resolution of this appeal.

As this case proceeds at a snail's pace, a proper statement of the issues on the record seems to have been

carefully avoided. The plaintiff is a civilian patrolman on the Naval Base police force. He stopped the daughter of the defendant, a Navy admiral, for a radar-detected speeding violation on the Naval Base on a Sunday afternoon. Upon being so informed, the Admiral ordered the patrolman to report to the Admiral's quarters on the Base. In an ensuing conversation, the plaintiff charges that the defendant called him "a liar." This suit, charging slander, libel, insulting words, etc., was thereafter filed in state court. It was removed to this Court by the United States Attorney representing the defendant.

The United States then filed its motion to be substituted as the sole defendant, with the announced intention that it would then move to dismiss the suit on grounds of immunity and on other technical grounds that timely notice of the claim had not been given to United States officials.

First, we found it incredible that the United States Attorney could make an affidavit that the words of the Admiral that the policeman who had stopped the Admiral's daughter for speeding was "a liar," were words spoken while the Admiral was acting within the scope of his employment as an employee of the United States. Secondly, to substitute the United States as the sole defendant, and to then dismiss the plaintiff's claims without any trial whatsoever, on grounds of immunity and failure to timely notify the United States of the pending claim, we feel was to completely ignore any semblance of constitutional "due process" to the plaintiff on his claim of alleged slander and libel.

Unlike *Mitchell v. Carlson*, 896 F.2d 128 (5th Cir. 1990), where the altercation between a military nurse assistant and her superior occurred in a heated work-related conversation over the proper keeping of patients' medical records, the case at bar had no such obvious scope-of-employment relationship. Here the civilian base policeman stopped the Admiral's daughter for radar-detected speeding on the Naval Base on a Sunday afternoon. The daughter and the Admiral's wife had conversations with the policeman. The Admiral ordered the policeman to report to the Admiral's quarters soon thereafter. There, it is alleged, the Admiral called the policeman "a liar."

Despite vehement protestations, we are unable to find this confrontation "to have been in the scope of Admiral Carter's employment."

The United States' motion to substitute and to then dismiss was denied.

The motion for a stay is GRANTED.

/s/ Illegible
United States District Judge

Norfolk, Virginia
May 15th, 1990.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

WILLIAM D. JOHNSON Plaintiff, v. POWELL J. CARTER Defendant.	]]]]]]]	CIVIL ACTION NO. 89-784-N

ORDER

The matter is before the Court on the United States' motion for reconsideration of the Court's prior decision denying the United States' motion to substitute itself as the sole defendant in this case. Additionally, the United States has filed a motion to dismiss the case for lack of jurisdiction. For the reasons stated below, the motion for reconsideration and the motion to dismiss are hereby DENIED.

On a prior occasion, the Court issued an oral Order from the bench denying the United States' motion to substitute as the defendant. The present action arose from a conversation between the defendant, an Admiral in the United States Navy and the Commander of the Atlantic Fleet, and the plaintiff, a civilian police officer on the Norfolk Naval Base, following a warning for speeding issued by the plaintiff to the defendant's daughter. Finding that the alleged actions of defendant Carter were

beyond the scope of his employment, the Court stated its reasons from the bench at the conclusion of the evidentiary "scope of employment" hearing on January 31, 1990. On February 8, 1990, the Court granted the United States' request to reconsider its ruling pending the plaintiff's deposition of the defendant Carter. Subsequently, the United States filed a copy of the deposition of defendant Carter and its brief to support its motion to reconsider substitution, which included a motion to dismiss the case based on a lack of jurisdiction.

I. MOTION FOR RECONSIDERATION

As no new evidence was presented to the Court which would warrant reconsideration of its prior ruling, the Court hereby DENIES the United States' motion for reconsideration.

To support its position for substitution, the United States places great reliance on *Wallen v. Domm*, 700 F.2d 124 (4th Cir. 1983), in which the Fourth circuit found the actions of the defendant fell within the outer perimeters of his duties as a government official. In that case, the plaintiff, a former head of psychology services at the Veterans Administration Hospital in Hampton, Virginia, filed suit against the defendant, the Chief of Staff at the hospital and the plaintiff's former supervisor, alleging that the defendant assaulted him during a discussion of the defendant's evaluation of the plaintiff's performance. Holding that the defendant had absolute immunity from civil liability, the Fourth Circuit stated that the defendant's "discussion with Wallen [the plaintiff] of his evaluation of Wallen's job performance, and Wallen's reaction

to that evaluation, falls well within the outer perimeter of his discretionary authority as Wallen's supervisor." *Id.* at 125.

The *Wallen* case is clearly distinguishable from the case presently before the Court. In *Wallen*, the parties were at work on a normal work day, the alleged tortious discussion occurred in the defendant's office, the defendant was the plaintiff's immediate supervisor, and, most importantly, the substance of the discussion was entirely work-related. In the instant case, Admiral Carter directed the required personnel to come immediately to his residence shortly after learning that his daughter had been stopped by the civilian base police. It was a Sunday and the defendant was not in uniform; rather, he was in civilian clothes doing some gardening around the house. As the Commander of the Atlantic Fleet, the defendant was responsible for the activities of all personnel on the Base; yet, the Base Commander (the individual directly responsible for the activities on the Base) was Admiral Pappas, not the defendant. Most importantly, the essence of the conversation concerned the altercation between the plaintiff and the defendant's daughter and not the existence of alleged problems with security at the Base, as asserted by the United States. The Court only wonders whether the defendant would have been so quick to respond had the daughter of a civilian been similarly stopped.

II. MOTION TO DISMISS

In its memorandum in support of its motion to substitute, the United States argues that this action is barred

by the intramilitary immunity doctrine, relying on the *Feres* doctrine. *See Feres v. United States*, 340 U.S. 135 (1950). Based on the circumstances and facts of this case, the Court finds no authority to support the United States' novel argument.

As the Fourth Circuit stated in *Haas v. United States*, 518 F.2d 1138 (4th Cir. 1975), "[i]t is settled that 'the Government is not liable under the Federal Tort Claims Act for *injuries to servicemen* where the injuries arise out of or are in the course of activity incident to service.' " *Id.* at 1139 (citing *Feres v. United States*, 340 U.S. 135, 146 (1950)) (emphasis added). In that case, the Fourth Circuit held that an active-duty serviceman, engaged in a recreational activity while off-duty, could not sue the United States for the alleged negligence of civilian employees of the military. Likewise, in *Stordahl v. Harrison*, 542 F.Supp.721 (E.D.Va. 1982), this Court held that a member of the Navy could not sue civilian security officers employed by the Navy since they were protected by the cloak of immunity provided by *Feres*. *Id.* at 725. As the courts have consistently held, the *Feres* immunity doctrine may be used to bar suits by military personnel against other military personnel (or their equivalent). The doctrine has never been used to bar suits by nonmilitary personnel against the military.

The Court is unwilling to accept the proposition that a civilian employee of the Navy, working on the Norfolk Naval Base, falls within the ambit of the *Feres* doctrine and is therefore barred from asserting an action by the intramilitary immunity. Without citing any relevant or persuasive authority, the United States is attempting to convert a shield into a sword in this case. The Court finds

this argument to be unsupported by any existing precedent and is reluctant to adopt such a position. Therefore, the United States' motion to dismiss is hereby DENIED.

It is so ORDERED.

/s/ Illegible
United States District Judge

Norfolk, Virginia
April 30, 1990.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

WILLIAM D. JOHNSON, Plaintiff,	)	
v.	)	CIVIL ACTION NO.
POWELL J. CARTER, Defendant.	)	89-784-N

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

January 31, 1990

BEFORE:

HONORABLE JOHN A. MACKENZIE, JUDGE

TAYLOE ASSOCIATES, INC.
Registered Professional Reporters
Telephone: (804) 461-1984
Norfolk, Virginia

[2] Appearances:

JEREMIAH A. DENTON, III, ESQUIRE
Counsel for the Plaintiff

UNITED STATES ATTORNEY'S OFFICE
By: MICHAEL A. RHINE, ESQUIRE

RAYMOND A. JACKSON, ESQUIRE
Counsel for the Defendant

[3] THE COURT: How about the second thing, Ms. Clerk? It's substituting the United States. We can hear that. I see Mr. Denton here, and I assume somebody is here from –

THE CLERK: Do you want me to call that case?

THE COURT: Yes.

THE CLERK: Civil Action 89-784-N, William D. Johnson versus Powell F. Carter.

THE COURT: All right. Who represents the United States in this case?

MR. RHINE: If Your Honor please, Mr. Jackson and myself represent Admiral Carter.

THE COURT: All right. It's your motion, Mr. United States Attorney. I'll be glad to hear from you.

MR. RHINE: If you Honor please, what I would like to start off with is to ask the Court to think back to three or four years ago before the Supreme Court's decision in Westfall versus Ervin, which I think is basically the same situation we are in now. The Court is familiar with the types of cases we heard prior to the Westfall decision. The law in this circuit was fairly well established by Wallen versus Domm and George versus Kay that government employees acting within the outer perimeter of their duties are absolutely immune to common law torts.

Williams versus the City of Portsmouth is a case we cited which your Honor had several years ago. It's our

position we [9] three words, we basically have innocuous conduct. The Court may or may not agree the Admiral handled this inappropriately.

THE COURT: It could have been handled worse.

MR. RHINE: He clearly called Admiral Pappas the next morning and made a complaint. He made an effort to talk to Admiral Pappas that Sunday and was not able to. The question is, given the context in which this occurred, was it within the outer perimeters of the Admiral's duty. We would submit it was, and this is exactly the type of situation we had several years ago before Westfall ever occurred.

We would submit that the whole purpose of this statute was to immunize people like this so that – People make mistakes, your Honor. There's no question about that, but this is exactly the type of situation in which the Congress intended to provide or reprovide immunity which they have always had.

THE COURT: Mr. Denton, anything you want to say?

MR. DENTON: Yes, your Honor. As a preliminary matter, I have filed a motion to file an amended complaint, which I understand is not opposed. The effect of that is simply to reduce the amount sued for to $100,000. Also, I filed a motion to compel on discovery only on the issue of scope of employment.

There are something like 12 interrogatories and three requests for admissions, and I think nine requests for

production and a deposition notice of the plaintiff outstanding

* * *

[15] involved a family member being – the integrity of a family member or anything about a family member.

THE COURT: Since I agree with you that the issue here is whether or not this was within the outer perimeters of the duty action on the part of the man, what is the discovery that you want? Let's get to that.

MR. DENTON: All right, your Honor. I would like to take the Admiral's deposition, number one, to determine what history – I mean what experience and training, if any, he has in such matters as supervising policemen.

THE COURT: All right. The Admiral's deposition. What else?

MR. DENTON: I have 12 interrogatories, your Honor. And I could read them to you. They are in the file. To provide a verbatim account of what happened.

THE COURT: Why would they be necessary if you're taking his deposition?

MR. DENTON: That one would not, your Honor. Number two, "State all facts upon which you rely in support of the contention that your activities were within the outer perimeter of your responsibilities," I could do that in the deposition. Let me look down, if I may. It will take me a moment to find the ones I could not do during the course of the deposition.

I can tell you, your Honor, the main one I'm interested in really will come in the request for production, and that's [16] going to pertain to any documents, local Navy instructions – instructions promulgated by the Admiral's own command dealing with this issue of leapfrogging the chain of command, whether you're going up or down the chain of command.

But if I may, give me a second. Interrogatory number six does deal with that issue about identifying directives and instructions, regulations and laws. I would like to have a response to that in a request for production, though, rather than just a deposition question, because I want those directives presented. My efforts to obtain information through the FOIA have been curtailed because of the fact that the litigation itself is pending. The instruction has gone out not to give me – for the federal government not to give me anything through FOIA.

THE COURT: I'll get it for you. Don't you worry about that.

MR. DENTON: I've asked him to identify other civil servants who have been reprimanded as a result of the civil servants allegedly having been rude to a military officer's family. That is reprimanded by the military officer himself. This is the kind of – some of these questions, your Honor, are the kinds of questions which if I pose them to a defendant in a deposition he's not going to know the answer.

THE COURT: You can't ask him for questions – You can't ask him interrogatories and expect him to answer if he doesn't [17] know the answer. The answer can just be, "I don't know."

MR. DENTON: But in an interrogatory there's a duty to inquire and find out.

THE COURT: I'll take the bull by the horns. Mr. Jackson, what's wrong with giving the deposition in the matter to determine the scope of employment proposition which is paramount here?

MR. JACKSON: Two things, Judge, if I may first start.

THE COURT: I'm going to tell you if you don't give the discovery I'm going to overrule your motion, so temper your thoughts on the subject.

MR. JACKSON: First, Judge, I wanted to point out this case, as Mr. Rhine pointed out to the Court, is one of these garden-variety state common tort acts.

THE COURT: I've heard all that argument I want to hear.

MR. JACKSON: Judge, traditionally on these cases, if the Court determines based upon a review of declarations and affidavits that the Court has been provided that it's insufficient for you to determine the scope issue, then the Court comes back and orders discovery.

THE COURT: I'm either going to do that, Mr. Jackson, or I'm going to sustain the – overrule the motion to put the United States in. Now, what do you want to do?

MR. JACKSON: If I may continue, Mr. Denton, apparently, has not read what he's been provided, and that's why I [18] suggested that the declarations and what's in the Court's file is key. He's just asked you for

regulations of something permitting the Admiral to intervene in the way he did, and that's already in the declaration of Admiral Edey, along with the cite of the CFR to give the Admiral authority to deal directly with his immediate subordinates, and not only to do that, but to directly intervene if he cannot reach his subordinates. So that information has been provided.

We submit, your Honor, that the information that the Court needs to make a scope determination is in the record. He's not going to be able to get anything further from Admiral Carter and Admiral Edey than what's already in the declaration pertaining to their duties, because their duties are set by statute and by regulation, and that's what the Admiral is going to mimic if he deposes him.

We're submitting, your Honor, in these cases, as usual, the Court has never, to my knowledge, ordered discovery to make a scope determination unless it read the files and the declarations of the parties and determined this is insufficient for him to determine that discovery is necessary. So the United States is simply requesting, your Honor, that the Court examine the declaration.

THE COURT: I can rule, Mr. Jackson. The motion of the United States to intervene is denied.

MR. JACKSON: To intervene?

[19] THE COURT: Is denied. In this case there is conduct allegedly conducted by Admiral Carter that is his own personal work. It's a defamation suit between him and a police officer as to whether the Admiral said

he was a liar or not, and I cannot in any way find that that's within the scope of his duty, Mr. Jackson, and the motion of the United States is – to intervene is denied and you can have a seat. Thank you very much.

(Thereupon, proceedings concluded.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

WILLIAM D. JOHNSON,

Plaintiff,

v.

POWELL F. CARTER, JR.,

Defendant

Civil Action No.
89-784-N

ORDER

(Filed MAR 21 1990)

CAME THIS DAY the plaintiff, by counsel, requesting a correction to the transcript of the hearing of January 31, 1990. At page 9, line 3 of that transcript, the court is quoted as having said "it could have been handled worse." In fact, line 3, page 9 omitted the word "not" between the words "could" and "have," and the line should have read "it could not have been handled worse."

Upon consideration whereof, the court Orders that the transcript be corrected as indicated.

ENTERED:

/s/ Illegible
Judge

I ASK FOR THIS:
/s/ Jeremiah Denton p.q.
Jeremiah A. Denton III

SEEN:

/s/ Raymond A. Jackson p.d.
Raymond A. Jackson

Order .072

28 U.S.C. § 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government –

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any

employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provision of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding

brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2[illegible] of this title, such a claim shall be deemed to be [illegible]y presented under section 2401(b) of this title if –

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect. June 25, 1948, c. 646, 62 Stat. 984; Sept. 21, 1961, Pub.L. 87-258, § 1, 75 Stat. 539.

(As amended July 18, 1966, Pub.L. 89-506, § 5(a), 80 Stat. 307; Nov. 18, 1988, Pub.L. 100-694, §§ 5, 6, 102 Stat. 4564.)

32 C.F.R. 721.18 Bedrock standards of conduct for Department of the Navy personnel

(a) To maintain public confidence in the integrity of the Department of the Navy which is essential to the performance of its mission, all naval personnel shall comply with the standards of conduct listed in this section.

(b) Avoid any action, whether or not specifically prohibited, which might result in or reasonably be expected to create the appearance of:

(1) Using public office for private gain,

(2) Giving preferential treatment to any person or entity,

(3) Impeding Government efficiency or economy,

(4) Losing complete independence or impartiality,

(5) Making a Government decision outside official channels, or

(6) Adversely affecting the confidence of the public in the integrity of the Government.

(c) Do not engage in any activity or acquire or retain any financial interest which results in a conflict between your private interest and the public interest of the United States related to your duties.

(d) Do not engage in any activity that might result in or reasonably be expected to create the appearance of a conflict of interest.

(e) Do not accept gratuities from defense contractors.

(f) Do not use your official position to influence any person to provide any private benefit.

(g) Do not use inside information to further a private gain.

(h) Do not use your rank, title, or position for commercial purposes.

(i) Avoid outside employment or activity that is incompatible with your duties or may bring discredit to the Navy.

(j) Never take or use Government property or services for other than officially approved purposes.

(k) Do not give gifts to your superiors or accept them from your subordinates. (Consult @ 721.6 for situations considered to fall outside this rule.)

(l) Conduct no official business with persons whose participation in the transaction would be in violation of law.

(m) Seek ways to promote efficiency and economy in Government operation and public confidence in its integrity.

SOURCE: 50 FR 9000, Mar. 6, 1985

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 133 and 5031, E.O. 11222, May 8, 1965; 5 CFR Part 735; 32 CFR Part 40.

Uniform Code of Military Justice

59. Article 133 – Conduct unbecoming an officer and gentleman

a. *Test.*

"Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

b. *Elements.*

(1) That the accused did or omitted to do certain acts; and

(2) That, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman.

c. *Explanation.*

(1) *Gentleman.* As used in this article, "gentleman" includes both male and female commissioned officers, cadets, and midshipmen.

(2) *Nature of offense.* Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing,

indecency, indecorum, lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet unrealistically high moral standards, but there is a limit of tolerance based on customs of the service and military necessity below which the personal standards of an officer, cadet, or midshipman cannot fall without seriously compromising the person's standing as an officer, cadet, or midshipman or the person's character as a gentleman. This article prohibits conduct by a commissioned officer, cadet, or midshipman which, taking all the circumstances into consideration, is thus compromising. This article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman. Thus, a commissioned officer who steals property violates both this article and Article 121. Whenever the offense charged is the same as a specific offense set forth in this Manual, the elements of proof are the same as those set forth in the paragraph which treats that specific offense, with the additional requirement that the act or omission constitutes conduct unbecoming an officer and gentleman.

*(3) *Examples of offenses.* Instances of violation of this article include knowingly making a false official statement; dishonorable failure to pay a debt; cheating on an exam; opening and reading a letter of another without authority; using insulting or defamatory language to another officer in that officer's presence or about that officer to other military persons; being drunk and disorderly in a public place; public association with known prostitutes; committing or attempting to commit a crime

involving moral turpitude; and failing without good cause to support the officer's family.

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[1] IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

WILLIAM D. JOHNSON,	)	
Plaintiffs,	)	CIVIL ACTION
	)	NO. 89-784-N
v.	)	
POWELL F. CARTER,	)	
	)	
Defendant.	)	

DEPOSITION UPON ORAL EXAMINATION
OF IRENE NORMA GLASS,
TAKEN ON BEHALF OF THE PLAINTIFF

Norfolk, Virginia

December 19, 1989

Appearances:

JEREMIAH A. DENTON, III, ESQUIRE
Counsel for the Plaintiff

MICHAEL RHINE, ESQUIRE
Counsel for the United States

DEC 22 1989

* * *

[3] Deposition upon oral examination of IRENE NORMA GLASS, taken on behalf of the Plaintiff, before Richard W. Zahn, RPR, a Notary Public for the Commonwealth of Virginia at large, taken by agreement of counsel, Commencing at 1:30 p.m. on December 19, 1989 at the offices of the United States Attorney, Walter E. Hoffman Courthouse Building, Norfolk, Virginia; and this in accordance with the Federal Rules of Civil Procedure.

IRENE NORMA GLASS, was sworn and deposed on behalf of the Plaintiff, as follows:

EXAMINATION

BY MR. DENTON:

Q. Lieutenant Glass, what is your full name?

A. Irene Norma Glass.

Q. And where do you live?

A. Norfolk. 1250 Whaley Avenue, Norfolk.

Q. And what is your work address?

A. Naval Station, Norfolk. CAAC/NADSAP, Concord Hall, Norfolk, Virginia. 23501.

Q. And can you give me your work and home phone numbers?

A. Work is 444-4019 and home is 461-1856.

Q. And your social security?

A. 089-46-6207.

* * *

[10] recall there was a lot going on, and the initial call from Lieutenant Commander Legal notified the OOD of this problem that had taken place shortly before then.

Q. Say there was a lot going on. Was that because of this call, or this problem?

A. To include?

Q. This and other things.

A. Yes.

Q. Okay. Who exactly is Lieutenant Commander Legal?

A. He was the CINCLANT Fleet duty officer that day.

Q. Do you know his first name?

A. No, I don't.

Q. All right. What exactly were you told, or did you hear about this situation when you got to the quarterdeck?

A. I don't recall exactly.

Q. What do you recall generally?

A. That I was, that the Admiral wanted the policeman involved and his boss and myself to go to his quarters together.

Q. And where did you get that – who told you that?

A. I believe Petty Officer Throckmorton, as

* * *

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

WILLIAM D. JOHNSON, Plaintiff,	)	CIVIL ACTION NO. 89-784-N
V.	)	
POWELL F. CARTER, JR., Defendant.	)	

DEPOSITION UPON ORAL EXAMINATION
OF ADMIRAL POWELL F. CARTER, JR.,
TAKEN ON BEHALF OF THE PLAINTIFF

Norfolk, Virginia

February 16, 1990

Appearances:

JEREMIAH A. DENTON, III, ESQUIRE
Counsel for the Plaintiff

UNITED STATES ATTORNEY'S OFFICE
BY: RAYMOND A. JACKSON, ESQUIRE
MICHAEL A. RHINE, ESQUIRE
Counsel for the United States

Also Present:

DEBORAH SAGEDY
COMMANDER RICHARD WALSH
WILLIAM JOHNSON

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* * *

[10] obviously, it would have ended right there.

BY MR. DENTON:

Q. Why did you need to tell Officer Johnson that you thought he was lying?

A. I just explained that.

Q. Was that the best explanation you can give?

MR. JACKSON: Objection. If you don't like it, you don't like the explanation, but that's his explanation.

BY MR. DENTON:

Q. I'm asking him if that is his complete explanation.

A. That is my explanation.

Q. Okay. Did it occur to you, Admiral, that Patrolman Johnson might have been mistaken rather than trying to say something that wasn't true?

A. All I could do is believe what he said. He flat denied that he did it. The whole purpose of the meeting with Officer Johnson was not to discipline him in any way or reprimand him or anything. The whole reason I called for him, as I told the duty officers, was I wanted to identify for sure who was the driver of that patrol car because my wife was not in any way certain that she had copied down a number on the car that would positively identify him.

* * *

[16] explaining why I was concerned with the behavior of the police, I suppose – I was also looking at Maynard in tinted glass who was standing off slightly to my left. Johnson was standing off more in the background on the right.

After I had finished explaining why I was interested in this, and that it wasn't the speeding ticket one way or the other – it was my concern over Johnson's conduct, and Maynard identified Johnson as the officer who had made the stop.

At that point, I turned to Johnson and said, "Are you the officer that stopped my daughter and used demeaning, aggressive, intimidating manners –" and I don't remember my exact words, but they were along those lines, frightened them – and in the process, accused my daughter of using my Four Star rank to avoid a speeding ticket?

So I asked him the two-part question. A, did you – all at one time, A, did you use an unnecessarily forceful attitude and approach, and, two, did you accuse her strictly on our own of trying to avoid a speeding ticket by being a daughter of a Four Star.

And he kind of rolled his eyes up and said, "No, none of those things," which, of course, would mean my family was lying.

* * *

[17] At that point, once he did that – and then I, you know, told him as I said earlier that I believe my family. I think you're lying. And I turned back to Maynard, and the rest of the conversation – I addressed him, so the only time that I ever addressed Johnson was that one compound question.

Q. So would you agree that you told him that you thought he was lying because you wanted to demonstrate that you did not believe your wife or daughter would say something that was untrue?

MR. JACKSON: Wait a minute, now.

THE DEPONENT: I've already answered that question before.

MR. JACKSON: Jerry, I'm going to object to this, because I think we've been over this a couple of times now. We've been over that same line a couple of times. Now, is there some other way you want to phrase that for him, but that's the same question. You've been over that now a couple of times.

BY MR. DENTON:

Q. Can you answer the question?

MR. DENTON: Are you instructing him not to answer?

MR. JACKSON: I'm asking you to rephrase the question and ask something that you haven't already asked

* * *

[19] Q. So you deny then that you were even partially motivated to protect the veracity of your family members when you told him that you thought that he was lying?

A. It never occurred to me.

I don't know why you are taking this line of questioning, because I've already told you at that point in time, it never occurred to me that, you know, I was in any kind of a contest involving, you know, my family, so I was just going to try to tell him that I didn't believe what he said.

Now, of course, it certainly made me angry a little bit. I was agitated about the fact – the way his whole demeanor was that, you know, obviously, my own family must be not telling the truth, but the primary motivation,

as I said, was the fact that my perhaps military mind was – I was at a juncture here – either I believed Officer Johnson or I didn't believe him.

If I believed him, then I should drop the whole thing. If I didn't believe him, then I thought he was lying, and the logical next step was to file a complaint.

Q. Well, you still haven't answered my question which is whether you were partially motivated by a desire to defend your family's veracity when you told him that

* * *

[91] A. Yes.

Q. And the laws, regulations, and orders come from both orders that are handed down the chain of command verbally and written instructions and written Navy regulations; is that true?

A. I would say it resides mostly in – I'm a little leery of the verbal ones, because the verbal ones are not a matter of record, so it's very difficult to keep track of verbal orders. But I will certainly agree that they come down mainly in the order of written laws, orders, and regulations such as you have, the Navy regulations, various instructions issued by higher authority.

Q. But my question really is, do the Navy regulations promulgated by the Secretary of the Navy and approved by the President of the United States constitute part of the orders and instructions which you and other Naval officers must obey?

A. Yes, I would agree to that.

Q. I want to give you a copy now of Article 700.702 of the Navy regulations.

A. Yes.

Q. Now, Article 700.702 pertains specifically to commanding officers; does it not?

A. Yes.

* * *